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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 269

JOHN WILLIAM SMITH,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JOHN WILLIAM SMITH,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on March 16, 1970.

Opinions Below

The opinion of the Supreme Court of the State of New Jersey which petitioner seeks to review is reported at 55 N. J. 476 (1970), and is set forth in the Appendix at 1a. That opinion affirmed the decision of the New Jersey Superior Court which denied petitioner's pre-trial motions. The decision of the Superior Court is reported at 102 N.J.S. 325 (1968), and is set forth in the Appendix at 14a.

Jurisdiction

On March 16, 1970, the Supreme Court of the State of New Jersey affirmed petitioner's conviction. To review that decision, petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3).

Questions Presented

I. Whether the denial of petitioner's claim that certain classes were excluded from the grand and petit jury selection processes presents a basis for certiorari?

A. Whether the courts' presumption that the excluded classes were unqualified and or exempt from jury service, and the assignment to petitioner of the burden of negating that presumption, presents a basis for certiorari?

II. Whether the denial of petitioner's claim that the Jury Commissioners failed in their affirmative duties to familiarize themselves with the composition of the community, and to act to ensure constitutionality elected juries, presents a basis for certiorari?

III. Whether the court's refusal to permit petitioner to examine more than one year's jury master lists denied petitioner due process of law and presents a basis for certiorari?

IV. Whether the denial of the claim that adverse publicity denied petitioner an impartial grand jury presents a basis for certiorari?

V. Whether the denial of petitioner's claim that the grand and petit jury loyalty oaths are unconstitu-

tional and violated petitioner's constitutional rights presents a basis for certiorari?

Constitutional and Statutory Provisions Involved

This petition involves the application of the First and Fourteenth Amendments to the Constitution of the United States.

It involves the following New Jersey Statutes.

N.J.S.A. 2A:69-1 sets forth the "Qualifications of Jurors" and is set forth at Appendix 47a.

N.J.S.A. 2A:69-2 sets forth "Exemptions from jury service", and is set forth at Appendix 47a-48a.

N.J.S.A. 2A:73-3 sets forth the grand jurors' oath and is set forth at Appendix 48a-49a.

N.J.S.A. 2A:69-1.1 sets forth the petit jurors' oath, and is set forth at Appendix 49a-50a.

N.J.S.A. 2A:70-1 is set forth at Appendix 50a.

Statement of the Case

Petitioner was arrested on July 12, 1967, and subsequently indicted for assault and battery on two Newark City patrolmen. On April 1, 1968, petitioner was convicted on one indictment. The jury was unable to reach a conclusion on the other.

The Unconstitutional Juries

In a pre-trial motion to dismiss the indictments in the New Jersey Superior Court and in the hearings on said motion, petitioner contended that five identifiable classes,

Negroes, women, residents of Newark, residents of Newark's Central Ward, and members of the lower economic classes were systematically excluded from and unconstitutionally underrepresented in the grand and petit jury selection processes in Essex County, thereby depriving petitioner of his Fourteenth Amendment rights (56a-57a; See Defendant's Supplemental Brief of February 23, 1968 in the Superior Court).

The proofs in brief summary showed that the Essex County Jury Commissioners compiled the grand jury master lists through the "somewhat outmoded" key man system by selecting names from their own sources. *State v. Smith*, 102 N. J. Super. 325; 346. The petit jury selection process begins with selection of names from the Essex County voter registration lists (MT II, 433-434, 473).* The names selected are checked for excludable occupations (MT II, 536-537). Questionnaires are then mailed to the remaining individuals (MT II, 480), and upon their return, further statutory exclusions are made for the lists (MT I, 384, MT II, 483-484).

The Exclusion of Black Persons From the Jury Selection Processes

1. Both Essex County jury commissioners were white suburban residents (MT I, 339, MT IV, 1335, 1340). For at least nineteen years no Negro had been a jury commissioner or on the commissioners' staff (MT IV, 1336, 1342).

2. The Commissioners and their staff did not know the racial composition of the community, and had never analysed jury lists to determine if Black persons were adequately represented (MT I, 366, 373-374, MT I, 397).

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*The citations MT I through MT IV are to the four volumes of the pretrial transcripts of the motion to dismiss the indictments.

Grand Jury

3. In 1962 the Assignment Judge of Essex County ordered the Jury Commissioners to select more Negroes for grand jury service (MT I, 377, 379, 383). This order was virtually ignored (MT 380-381, 383, 399-401).*

4. In 1967, black persons represented 25% of the Essex County population between the ages of 21-74 (MT III, 1013-1014, MT III, 1010).** A professionally directed statistical analysis of grand jury master lists revealed the percentage of Negro persons on those lists to be 6%, a disparity from the population of 19%. Petitioner's expert statistician testified that the probability of observing that few Negroes on a grand jury master list is less than one in one million (MT IV, 1137-1138). The disparity means that 76% of the Negro population qualified as to age were excluded. (6% is 24% of 25%).

5. The exclusion of Negroes from the grand jury master lists was accomplished in part by an exclusion of Newark

* The Commissioners' office wrote letters to seven Negroes including two Judges, people belonging to Negro organizations, and to some churches (MT I, 380-381, 399). This effort produced 250 names (MT I, 402). Questionnaires were sent out and some responses were received, but Commissioner Howie did not follow up to see if the cards came in (MT I, 399-401). This effort to obtain more Negroes occurred in 1963; nothing further has been done since (MT I, 402).

** Petitioner takes strong issue with the trial court's conclusion that the appropriate percentage to be assigned Negro representation in the County population in 1966-1967 is 17. See 102 N. J. Super. at 351. The figure of 17% was derived from the 1960 census evaluation. The overwhelming uncontradicted evidence in the record demonstrates that in 1966, the percentage of Negroes qualified as to age had increased to 25%. (MT III, 1012-1014, see Reply Brief of Defendant-Appellant in State Supreme Court, pp. v-vi).

residents. Newark residents comprised, during 1960-1967, approximately 41.7% of the Essex County population between the ages of 21-74. (MT III, 1042). Negroes comprise over 50% of the Newark population. Yet Newark residents comprised only an average of 14.5% of the grand jury master lists from 1960-1967, a disparity of 27.4% (See Table II, Appendix 61a).

6. Residents of the Central Ward of the City of Newark, which is approximately 84% black, were substantially under-represented on the grand jury master lists (Table III, IV, V, Appendix 62a, 63a).

Petit Jury

7. A statistical analysis of the petit jury master lists revealed that approximately 8.36% were Negro, a disparity from the Negro population of 16.64%. (25% — 8.36% = 16.64%, MT IV, 1175). This disparity means that 67% of the Negroes qualified as to age were excluded (8.36% is 33% of 25%.)

8. Newark residents are underrepresented by over 50% on the petit jury lists (Table XI, 68a, Table XVIII, 71a).

9. A major systematic exclusion of Newark residents occurs, because a statistically improbable low percentage of questionnaires sent to prospective jurors are mailed to Newark residents, (MT IV, 1156-1162) thus demonstrating that names are not selected at random from the voter registration lists.

10. Residents of Newark's predominantly black Central Ward, are also substantially and systematically excluded in the mailing process (MT IV, 1170-1174, MT IV, 1419-1420, MT II, 694-695).

11. Members of the lower economic classes were severely underrepresented on the grand and petit jury lists (Table VII, 64a, Table IX, 65a). The Commissioners vir-

tually ignored a 1962 court order to obtain more "laboring" people for the grand jury (MT I, 378). This also accomplished an exclusion of black persons (Table VIII, 65a).

12. The petitioner was tried by an all white jury of 14. Only three of the fifty-four jurors examined on the voir dire were black, and these were peremptorily excused by the prosecutor. (VT I, 39-42, VT II, 103-115, VT III, 103-109)*

Women were substantially excluded from the grand and petit jury lists (Tables I, 60a, X, 66a-67a, XII, 69a, XVI, 70a).

During the pre-trial hearings the trial court permitted petitioner to have copies of only four petit and four grand jury master lists from May 1966-May 1967 (MT I 138-139; MT II 444-445), thereby partially restricting petitioner's jury study.

Adverse Publicity

On July 12, 1967, petitioner was arrested by two Newark City patrolmen. This incident ignited massive civil disorders in the City of Newark which left twenty-six dead, saw hundreds arrested and wounded, and caused untold destruction.

On July 17, 1967, the day the New Jersey National Guard departed Newark, the Essex County 15th and 16th grand juries were specially convened to consider the charges against those arrested. Widespread and sensational adverse publicity in the mass media surrounded the civil disorders and grand jury proceedings. The attention of the public was particularly focused on petitioner, whose photograph appeared on the cover of the

* Citations are to the three volumes of the *voir dire* transcript of petitioner's trial in the Essex County Court.

nationally circulated *Time* magazine. The Essex County Court gave a prejudicial charge to the grand jury (MT 1, 2-3). On July 25, 1967, the Essex County Grand Jury indicted petitioner.

The Loyalty Oaths

The grand jurors who indicted petitioner took a loyalty oath set forth in N.J.S.A. 2A:73-3, which states in part:

> "that you do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of such means. . . ." (48a-49a).

The petit jurors who convicted petitioner had taken an identical loyalty oath set forth in N.J.S.A. 2A:69-1.1 (49a-50a).

Citation to the Record Where the Federal Questions Were Raised

Petitioner's claims, that the selection of the grand and petit juries deprived him of his Fourteenth Amendment rights, were raised in pre-trial hearings on a motion to dismiss the indictments. (56a-57a: Defendant's Supplemental Brief of February 23, 1968 in the Superior Court: See tables at 60a-71a in Appendix to this petition). Said claims were rejected by the Court in *State* v. *Smith*, 102 N. J. Super. 325, 344-357, and briefed for the State Supreme Court (Brief of Defendant-Appellant, pp. 1-21), which affirmed essentially for the reasons given by the Court below. *State* v. *Smith*, 55 N. J. 476, 481.

In the pre-trial motion to dismiss the indictments petitioner also contended that the grand jury was biased against him because of adverse prejudicial publicity, thereby denying him due process of law (51a-52a, MT 3-4); and that the grand and petit jury loyalty oaths violated the First and Fourteenth Amendments to the Constitution of the United States (52a-54a, MT I, 4-5). The Court rejected the adverse publicity claim, 102 N. J. Super. at 338-39, held that petitioner had no standing to challenge the loyalty oaths, 102 N. J. Super. at 335, and held that, in any event, the oaths were constitutional. 102 N. J. Super. at 335-336. Petitioner presented these issues to the State Supreme Court. (Brief of Defendant-Appellant, respectively at pp. 26-30, pp. 30-38), which rejected them. 55 N. J. at 482.

Petitioner also contended that the Essex County Jury Commissioners failed in their affirmative duties to familiarize themselves with the community, and to take affirmative action to ensure juries representative of a cross section of the community. (See defendant's Supplemental Brief of February 23, 1968, in the Superior Court, pp. 68-74, MT II 363, 368). The lower Court did not deal with this issue. Petitioner briefed this issue for the State Supreme Court. (Brief of Defendant-Appellant, pp. 16-17; Reply Brief of Defendant-Appellant, pp. 25-32), which also did not deal with the issue.

Petitioner's claim that the trial Court erred in restricting the examination of the jury lists, thereby depriving him of due process of law, was not presented to the State Supreme Court.

REASONS FOR GRANTING THE WRIT

POINT I

In deciding that petitioner's jury exclusion proofs did not constitute a *prima facie* case of discrimination, the New Jersey courts presumed that the excluded groups were unqualified or exempt from jury service, and erroneously assigned petitioner the burden of negating that presumption.

A. The State Courts' rulings conflict with the established decisions of this Court.

"It is a well established principle of our jurisprudence that juries, as instruments of public justice, be truly representative of the community." *State* v. *Smith*, 102 N. J. Super. 325, 345 (L. Div. 1968). See *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). To implement this principle the federal Constitution guarantees an accused "due process and equal protection rights to an impartial jury representing a cross-section of the community." *Labat* v. *Bennett*, 365 F. 2d 698, 720 (5th Cir. 1966) (*en banc*). The term cross-section "means a very sample" of the community. *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414, 429 (3rd Cir. 1955).

Petitioner contends that he established a *prima facie* case of the systematic underrepresentation of five identifiable classes thereby depriving him of indictment and trial by a jury of his peers. *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880).

"Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case." *Patton* v. *Mississippi*, 332 U. S. 463, 466 (1947). Where the accused affirmatively shows a con-

tinuing pattern of substantial disparities between the size of identifiable groups within the community and their corresponding numbers on the jury lists, he has "made out a *prima facie* case of denial of equal protection." *Norris* v. *Alabama*, 294 U. S. 587, 591 (1935). This *prima facie* showing places the burden of proof on the State, to come forward with sufficient evidence in rebuttal. *Whitus* v. *Georgia*, 385 U. S. 545, 552 (1967); *Coleman* v. *Alabama*, 389 U. S. 22, 23 (1967); *Pierre* v. *Louisiana*, 306 U. S. 354, 361 (1939); *Turner* v. *Fouche*, 90 S. Ct. 532, 540 (1970).

Once the *prima facie* case is established, any presumption that the commissioners properly discharged their official duties must give way. *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967). Rather than presume that unarticulated factors exist which rationally explain the disparity, the presumption which the State must overcome is that there are qualified jurors among underrepresented groups in the community whose placement on the jury lists would eliminate the disparity. The United States Supreme Court has held that, where there is a "large number of male colored residents of the county who are literate, and in the absence of any countervailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for grand jury service." *Hill* v. *Texas*, 316 U. S. 400, 404 (1942). See also *Brown* v. *Allen*, 344 U. S. 443, 471 (1953); *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946); *Turner* v. *Fouche*, *supra* at 540.

The New Jersey Courts ignored the above principles, and ruled in direct conflict with them. The Courts held:

> "There were no statistics introduced in evidence to indicate the number of persons qualified for jury service in any of the aforesaid classifications. For example, there was no evidence to indicate the

> number of persons classified in 'craftsman' who were eligible for jury service. There was no evidence presented to indicate to this court the percentage of those persons in each class who were not qualified for jury service or were exempt from it. In addition, there were no statistics presented to the court to indicate the percentage of persons in each class who were or were not registered to vote in the County of Essex. There is *a probable inference* that the composition of the grand jury panels was a result of the legitimate application of statutory standards of qualifications and exemptions. Thus, if this court were to find discrimination in the case at bar based solely on the aforesaid statistics, that conclusion would be founded on mere conjecture and speculaion. . . . This court *therefore* concludes that there in insufficient evidence to support a *prima facie* case of discrimination in the selection of the grand jury panels." 102 N. J. Super. at 351-352 (Emphasis supplied).

In disposing of petitioner's strong statistical proofs showing exclusion from the grand jury lists, the Court first listed some of the statutory qualifications for, and exemptions from jury service, 102 N. J. Super. 352-353, and then concluded that petitioner's statistician did not consider them.* The Court concluded, *without any basis in fact in the record*, that "These factors would significantly decrease the number of qualified persons in each of the aforesaid groups." 102 N. J. Super. at 353.

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* The statistician did consider these factors in most of his calculations. He presumed that they applied equally to all groups and that one class would not be affected by a factor more than another (MT III, 1046, 1049, 1050). Logic dictates this assumption. (See N.J.S.A. 2A:69-1 (47a). 2A:69-2 (47a-48a.)

In disposing of petitioner's claim that Negroes were excluded from petit jury service, the Court similarly held:

> "There is *the strong probability* that this segment of the Negro population [the segment revealed by appellant's showing of disparity] is not qualified for jury service or is exempt from jury service or has simply failed to register to vote. This court therefore concludes that defendants have failed to establish a *prima facie* case of jury exclusion against Negroes in the case at bar." 102 N. J. Super. at 356. (Emphasis supplied).*

The Court thus presumed what this Court said it could not presume—that black persons were unqualified for jury service.

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* The Courts' presumptions also ignored the substantial record and argument showing that petitioner's statistics were compiled with regard to the qualifications of the excluded groups. (For a complete analysis of this point, see Reply Brief of Defendant-Appellant in the State Supreme Court, pp. 8-22; see footnote at page 12 of this petition.)

For example, petitioner proved that the residence and literacy qualifications *would not* exclude Negroes more than whites. (Table XIII, 70a; S-1 in evidence, Table 7).

For example, all statistics are based on the age qualification for jury service. Moreover the statistically improbable exclusion of Newark and Central Ward residents in the mailing of questionnaires to prospective petit jurors occurred *before* the statutory exemptions and qualifications were considered. In addition, the underrepresentations shown are so statistically improbable that the application of qualifications and exemptions could not explain them.

These misstatements of the rule impose upon a defendant an impossible burden of first proving systematic disparities, second, developing reasonable explanations why the disparities might lawfully exist, and third, proving that these possible explanations have no basis in fact. They conflict with the proper logic that "had there been evidence obtainable to contradict" the disparities, "the State would not have refrained from introducing it." *Hill* v. *Texas*, 316 U. S. 400, 405-406 (1942).

The Courts' ruling is especially critical since the State offered no evidence to rebut petitioner's statistics.

B. The denial of petitioner's jury exclusion claims present questions of substantial importance for this Court.

1. The statistical approach

> "The Courts have continuously held that statistics speak louder than the jury commissioners." *Brooks* v. *Beto*, 366 F. 2d 1, 12 (5th Cir. 1966).

In *Whitus* v. *Georgia*, 385 U. S. 545 (1967), this Court noted with approval the application of the science of statistics to the jury discrimination field. It stated:

> . . . [i]t is interesting to note the "probability" involved in the situation before the Court.
>
> * * * *
>
> Assuming that 27% of the list was made up of the names of qualified Negroes, the mathematical probability of having seven Negroes on a venire of 90 is .000006. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrim-

ination Cases, 80 Harv. L. Rev. 338 (1966). *Whitus* v. *Georgia*, *supra* at 551, footnote 2.*

In the instant case, Dr. Walter Dick, a Ph.D. in Applied Mathematical Statistics and an Assistant Professor of Statistics at Rutgers University, testified extensively on the virtual statistical impossibility of obtaining the challenged grand and petit jury lists due to chance (MT IV, 1133-1342).

This case therefore, provides a major opportunity for this Court to apply the science of statistics to the jury field.

This approach is extremely valuable. It provides definite scientific standards by which a court can determine whether a disparity between the percentage of a class in the community, and the percentage of that class on the jury lists could have occurred due to chance alone. If a disparity is statistically improbable, chance is eliminated as the reason, and a *prima facie* case of discrimination is established. This approach will obviate reliance on an "intuitive and untutored understanding of the laws of chance," and provide much needed guidance in this area. Kuhn, Roger, "Jury Discrimination: The Next Phase," 41 So. Cal. L. Rev. 235, 252-255.

Second, a decision approving the statistical approach would encourage the fifty states to employ statisticians 1) to develop plans *specifically* designed to obtain a cross section of a given community, 2) to analyse jury lists to determine if an existing system is producing a representa-

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* This Court has historically applied a statistical approach to the jury discrimination field. Thus in *Hill* v. *Texas*, 316 U. S. 400 (1942) the Court stated, ". . . *chance* or *accident* could hardly have accounted for the continuous omission of Negroes from the grand jury lists . . ." *ibid.* at 404. See also *Smith* v. *Texas*, 311 U. S. 128, 131 (1941); *Eubanks* v. *Louisiana*, 356 U. S. 584, 587 (1958); *Hernandez* v. *Texas*, 375 U. S. 475, 482 (1954).

tive cross section. Scientific guidance to preserve fundamental constitutional rights is vital. See discussion in Point II of this petition. See Kuhn, Roger, "Jury Discrimination: The Next Phase," 41 So. Cal. L. Rev. 235, 255-256.

2. Underrepresentation of black persons on the grand and petit jury master lists.

This Court has not, at least in recent history, decided a case charging racial jury exclusion in the North. The law in this area has arisen from states where blacks were overtly excluded from jury service, e.g., *Strauder* v. *West Virginia*, *supra*, and from southern states where there exists a strong history and presumption of racial discrimination, e.g., *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Whitus* v. *Georgia*, *supra*; *Coleman* v. *Alabama*, *supra*.

It is now clear that racial discrimination has infected every section of this country. The tragic violent upheavals of recent years struck every section of the country, and in 1967, when this case arose, struck Newark, Plainfield, New Brunswick and Englewood, New Jersey. "Report of the National Advisory Commission on Civil Disorders," New York Times Publishing Company, 1968, pp. 56-83.

The Kerner Commission established by President Johnson concluded:

> What white Americans have never fully understood —but what the Negro can never forget—is that the white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it. Report of the *National Advisory Commission on Civil Disorders*, *supra*, p. 2.

And see *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

This case presents an important opportunity for this Court to underscore that a defendant in all sections of the country has the right to indictment and trial by constitutionally selected juries.

The disparity between the Negro population in the community, 25%, and the precentage of Negroes on the grand jury master lists, 6%, is 19%.

In *Whitus* v. *Georgia*, *supra*, this Court found unconstitutional discrimination where the actual disparity was *less* than in the instant case, 18%. 385 U. S. at 552. On the basis of the statistics, therefore, this Court should be bound by *Whitus*.

Petitioner's case is stronger than *Whitus*, *supra*. In *Whitus* the segregated tax lists provided an "opportunity for discrimination," 385 U. S. at 552, but here the commissioners' decision to ignore a 1962 Court order to obtain more black grand jurors constitutes actual discrimination. (See statement of the case, paragraph 3, and accompanying footnote). This is far more concrete evidence of systematic exclusion than the speculation that the "opportunity for discrimination" may have been utilized.

As to the petit jury the disparity of 16.64% (Statement of Case, par. 7) is slightly more than 1% smaller than the disparity struck down in *Whitus*, *supra*. The exclusion of Negroes from the petit juries has been systematic.*

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* Commissioner Howie testified that in 1962 the voter registration lists were not producing enough Negroes for grand jury service. Since the petit jury lists were also chosen from the voter registration lists, presumably said lists were not producing enough Negroes for the petit jury lists. The deliberate exclusion of black persons from the petit jury lists is further exemplified by the unexplained exclusion of Newark residents and residents of the Central Ward from the petit jury mailings. (See Statement of the Case, pars. 9, 10.)

3. *Underrepresentation of the lower economic classes on the grand and petit jury master lists*

This form of discrimination was declared unconstitutional in *Labat* v. *Bennett*, 365 F. 2d 698, 720-721, 724; see also *Ballard* v. *United States*, 329 U. S. 187, 195; *Thiel* v. *Southern Pacific Co.*, *supra* at 219-224. The record clearly demonstrates that members of low income occupational classes are substantially underrepresented on both grand and petit Jury lists (Table VII, 64a, IX, 65a).

That this exclusion was intentional is clear. In 1962, the Essex County Court ordered the Jury Commissioners to place more laboring people on the grand jury, but this order was ignored (MT, I 377).*

Moreover, the Jury Commissioners' staff compounded this exclusion by excusing prospective jurors from service for reasons of financial hardship (MT, II 457-458, MT, II 520-521), a practice unauthorized by state law. See *Labat* v. *Bennett*, *supra*, at 719.

This Court has strongly endeavored to eliminate economic discrimination. See *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and its progeny; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). It is now time for this Court to eliminate economic discrimination in the jury selection area and to reconsider its decision *Fay* v. *New*

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* In response, Commissioner Howie sent out letters to five union locals (MT I 378). *This effort produced only fourteen names, and no additional steps were subsequently taken to obtain laborers* (MT I 378).

Since the voter registration lists were also the source of petit jury lists, presumably the voter lists were not producing enough laboring persons for the petit jury lists.

York, 332 U. S. 261 (1947).* The substantial record in this case presents an ideal and ripe opportunity for this review.

4. *Underrepresentation of Newark* residents on the *grand and petit jury master lists*

Another identifiable class which may not be permissibly underrepresented in the jury system is that comprised of persons residing in a specific geographical area. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 219 (1946). *Strauder* v. *West Virginia*, *supra* at 308.** This Court, however, has never ruled on the question of geographical discrimination in a state jury exclusion case.

This issue is especially important, since in large urban populations, geographical discrimination may accomplish racial discrimination.

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* Petitioner recognizes that his argument that the federal Constitution prohibits economic class discrimination in the jury selection process would seem to run up against the barrier presented by *Fay* v. *New York*, 332 U. S. 261 (1947), in which a majority of the United States Supreme Court, over a vigorous dissent, upheld the so-called "blue ribbon grand jury." However, the passage of time and with it the development of new Constitutional doctrines seems to have eroded much of the policy behind the *Fay* decision. A violation of the Equal Protection Clause is today inferred simply by looking at the objective disparities resulting from the perhaps neutral workings of a governmental system. *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.C.D.C. 1967). Discrimination in fact is impermissable when it "reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U. S. 186, 226 (1962).

** N.J.S.A. 2A:70-1 requires that jury lists shall be compiled by the commissioners with "regard to the just distribution of jury service among those persons qualified therefore in the various wards and municipalities. . . ."

The issue is one of nationwide importance since a survey of state statutes reveals that only three states have statutes which *require* that consideration be given to geographical representation on the juries.*

Moreover this is a proper case for this Court since the record demonstrates statistically improbable systematic exclusion of Newark residents on the grand and petit jury master lists. (See Table 11, 61a; see also Statement of the Case, pars. 5, 8, 9).**

Since a jury selection process must result in a representative cross-section of the community, the decisions below rejecting the geographical exclusion claims conflict with the applicable decisions of this Court.

5. *Underrepresentation of women on the grand and petit jury master lists*

> "The systematic and intentional exclusion of women, like the exclusion of a racial group, Smith v. Texas, 311 U. S. 128, or an economic or social class, Thiel v. Southern Pacific Co., supra, deprives the jury system of the broad base it was designed by Congress to have in our democratic society." *Ballard* v. *United States*, 329 U. S. 187, 193 (1946).

Women have the same constitutional right to be represented on juries as do men. *White* v. *Crook*, 251 F. Supp. 401 (M. D. Ala. 1966). There is no reason in law or in

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* Ill. Ann. Stat. 78 § 31; Iowa Code Ann. § 609.2; N.J.S.A. 2A:70-1.

** Petitioner takes strong issue with the statistical findings made by the Court in rejecting petitioner's claim that there was systematic exclusion of Newark residents in the mailing procedure. (See 67a and accompanying footnote.)

logic "why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group." *United States* v. *York*, 284 F. Supp. 8, 14 (D. Conn. 1968). See *Avery* v. *Midland County*, 390 U. S. 474, 498 n.2 (1968) (Dissenting opinion of Mr. Justice Fortas); *Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 Neb. L. Rev. 131 (1968).

This issue assumes increasing importance in this age of increasing women's rights.

POINT II

The jury commissioners failed in their affirmative constitutional duty to familiarize themselves with the composition of the Essex County community, and to act to ensure constitutionally selected juries. The New Jersey courts did not discuss or decide this issue which in effect constitutes a decision squarely in conflict with the applicable decisions of this Court.

Since *Neal* v. *Delaware*, 103 U. S. 370 (1880), it has been clear that jury officials have an affirmative federal constitutional duty "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, *supra*, at 404. Compare *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir. 1966); *Rabinowitz* v. *U. S.*, 366 F. 2d 34, 58 (5th Cir. 1966). "When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.'" *Cassell* v. *Texas*, 339 U. S. 282, 289; *Smith* v. *Texas*, *supra*, at 131-132. In *Cassell* the Court stated:

> "There was further discussion of the duty of jury commissioners to familiarize themselves with jury eligibles in *Hill* v. *State*, 144 Tex. Cr. R. 415, 418, 157 S. W. 2d 369, 371. The commissioners' lack of acquaintance with available Negroes was not deemed sufficient by the state court to justify reversal. We disagreed and reversed." 339 U. S. at 289 n.26.

The imposition of these duties is logical because one cannot sample a representative cross section of the community, unless one knows the composition of that community, and the composition of the jury lists which his system is producing. The commissioners' exercise of this duty is vital because:

> Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties. *Glasser* v. *United States*, 315 U. S. 60, 86 (1942).

See also *Turner* v. *Fouche*, 90 S. Ct. 532, 549 (1969); *State* v. *Stewart*, 2 N. J. Super. 15, 26 (App. Div. 1949). See also Kuhn, Roger, "Jury Discrimination: The Next Phase," 41 So. Cal. L. Rev. 234, 257-258, 315-321.

The Commissioners and their staff in this case completely failed in their above duties. Commissioner Howie admitted he did not know the number of people in Newark in relation to the number of people in the County, the

number of Negroes in the County, the adult Negro population in the County or in Newark, the number of adult women in the County, the number of registered voters in Essex County or in Newark, the population of Essex County or any of its cities, nor was he familiar with occupational statistics relevant to the County or to Newark. (MT, I 366, 373-374). He conceded that he had not discussed any of these questions with the other Commissioner, nor had he ever given instructions to his staff to make inquiry into these matters (MT, I, 374). He had no knowledge of the occupational breakdown of the 1966-1967 lists and testified that there were no such statistics in his department (MT I, 395). He had never examined a Grand Jury master list to test whether it approximated a cross section of the Essex County population with respect to occupation, race, residence, or sex. (MT, I, 397) nor had he given any instructions to his staff to make such an analysis of the Grand or Petit Jury lists from May, 1966 to May, 1967 (MT, I 398).

Mrs. Concetta Toscano, seemingly the member of the staff most acquainted with the procedures employed in the selection process, stated that she had no knowledge of either the percentage of Newark residents within the ages of 21 and 74 or the number of Negroes registered to vote in Newark or in the County at large (MT, II 501, 504).

When the Commissioners admittedly realized that the venires were unrepresentative in certain respects, they took no steps to rectify the imbalance. Thus Commissioner Howie admittedly knew that Newark residents were underrepresented on the grand jury venires, but the negligible steps he took to rectify this failed (MT, II 486, 489, 498; see Table II, 61a). Mrs. Toscano testified that she knew there was a deficiency of women on the jury lists, but that nothing was done about it (MT, IV 1373).

Most reprehensible was the decision of the commissioners to virtually ignore the 1962 order of the Assignment Judge of the Essex County to select more Negroes and laborers for grand jury service. (See footnotes at pages 5 and 18). At that point it was incumbent upon the Commissioners to develop a compensatory plan to ensure the fair representation of those classes on the juries. *Brooks* v. *Beto*, *supra*, Kuhn, Roger, "Jury Discrimination: *The Next Phase*," *supra* at 315-321.

As noted, neither State Court confronted and decided this issue. Had they done so it would have required a reversal. Their failure to decide is in effect a decision squarely in conflict with the above Supreme Court decisions.

The issue is also one of national importance. A survey of the fifty states reveals a legislative indifference to jury selection.

In nineteen states no jury Commissioners are appointed. Jury lists are compiled by other government officials.*

In only seven states do statutes provide for office space and/or staff for jury commissioners.**

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* Alaska Stat. § 09.20.050 (1962); Ariz. Rev. Stat. Ann. § 11-211 (Sup. 1969); Idaho Code Ann. § 31-3105 (Supp. 1969); Iowa Code Ann. § 608.1 (1950); La. Rev. Stat. § 3043 (1967); Md. Ann. Code art. 51, § 6 (1957); Mass. Ann. Laws ch. 234, § 4 (1956); Minn. Stat. Ann. § 593.13(1) (Supp. 1969); Miss Code Ann. § 1766 (Supp. 1968); Mt. Rev. Code § 93-1041 (1947); Neb. Rev. Stat. § 25-1652 (1964); N.H. Rev. Stat. Ann. § 500.1 (Supp. 1968); N.D. Cent. Code § 27-09-09 (Supp. 1967); Okla. Stat. Ann. tit. 38, § 8 (1951); S.C. Code Ann. §38-51 (1962); S.D. Code Ann. § 16-35-5 (1967); Vt. Stat. Ann. tit. 4, § 901 (1958); Wash. Rev. Code Ann. § 2.36.060 (1961); Wyo. Stat. Ann. § 18-105 (1967).

** Ill. Ann. Stat. ch. 78, §29 (1961); Ind. Ann. Stat. § 4-7104 (1964); N.Y. Judiciary Laws § 654; Neb. Rev. Stat. § 25-1625 (5) (1964); Ohio Rev. Code Ann. § 2313.05 (Page 1965); R.I. Gen. Laws Ann. § 9-9-12 (1967); Wis. Stat. 255.03(3) (1961).

Despite the constitutional mandates, no state statute requires that jury commissioners have knowledge of the ethnic and racial composition of the communities they serve, nor do the state statutes require that juries be chosen in a manner designed to obtain a representative cross section of the community.*

In only one state does a jury commissioner work full-time.**

In those states which appoint jury commissioners, the pay authorized is so low that a commissioner has no incentive to work at the job.*** In the instant case Com-

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* Three partial exceptions are: Ill. Ann. Stat. 78 § 31; Iowa Code Ann. § 609.2; N.J.S.A. 2A:70-1.

** R.I. Gen. Laws Ann. § 9-9-5; But see N.Y. Judiciary Law § 651; Mo. Stat. Ann. § 497.040 (Jackson County), § 498.080 (St. Louis).

*** Ala. Code Tit. 30, § 12 (1958): $5.00/day; Ark. Stat. Ann. § 39-201 (Supp. 1969), $10.00/day; Cal. Civ. Proc. Code § 204a (Supp. 1969), up to $3000./year; Colo. Rev. Stat. Ann. § 78-4-3 (1963), $50.-$100./month; Conn. Gen. Stat. Ann. § 51-225 (Supp. 1969), up to $300./year; Del. Code Ann. Tit. 10, § 4501 (Supp. 1968), $1000./year; Fla. Stat. Ann. § 40.13 (Supp. 1969), $100.-$1200./year; D.C. Code Ann. § 2303 (1967), up to $250./year; Ga. Code Ann. § 59-105 (1965), $3.00/day; Hawaii Rev. Laws § 609-9 (1963), $100.-$250./year; Me. Rev. Stat. Ann. ch. 14, § 1251 (Supp. 1970), $100.-$275./year; Kan. Gen. Stat. Ann. § 43-154 (1964), $50./month; Ky. Rev. Stat. Ann. § 29.065 (Supp. 1969), $5.00/day; Mich. Comp. Laws 27A.1241 (Supp. 1956), $10.00/day; N.M. Stat. Ann. § 19-1-5 (1953), $1.25/hour; Pa. Stat. Ann., Tit. 16, § 11025, 11053, 11071, 11102, 11121, 11141 (1966), $12.50/day-$1400./year; Tenn. Code Ann. § 22.223(b) (1955), $10.00/day; Texas Ann. Civ. Stat. Art. 2104 (Vernon's 1955), $4.00/day; Utah Code Ann. § 78-46-16 (1953), up to $8.00/day; Va. Code Ann. § 8-180 (1950), $10.00/day; Wis. Stat. § 255.03 (1961), $4.00-$16.00/day; W. Va. Code Ann. § 52-1 (Supp. 1969), up to $150./year.

missioner Howie was unfamiliar with the procedures in his office, such that he could not testify without consulting an office memorandum (MT, I 347-349, 351-352). The Court stated that this was because "a Jury Commissioner in this County gets the big sum of $900 and that he has to have a staff that does this." (MT, I, 352).

The commissioner is the key to any successful system.* He must supervise it, analyze it to see if it is working, be familiar with the community and shifts in population, and correct the system when it fails. The above legislative indifference to jury selection and to the role of the jury commissioner underscores the vital need for forceful and clear directives from this Court.

POINT III

The refusal of the trial Court to give Petitioner copies of more than four grand and four petit jury master lists, partially restricted petitioner's jury study and presents a federal question of substantial importance.

The Court refused to give petitioner physical possession of pre-1966 jury master lists. Since physical possession was necessary to analyze the racial, ward, and occupational composition of a list, this restriction

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* The State Supreme Court noted recent changes in the New Jersey selection system. 55 N. J. at 481 citing *State v. Rochester*, 54 N. J. 85, 91-92. The major change is the abolition of the key man system and the selection of grand jurors on a random basis from the voter registration lists. This was allegedly the petit jury selection system in this case, which the petitioner proved to have failed. The new system will not work unless enforced by a conscientious commissioner who actively and affirmatively seeks to satisfy constitutional requirements.

deprived petitioner of the maximum opportunity to present the strongest possible case of exclusion of certain classes.* Nonetheless, the record clearly demonstrates a prima facie case of racial and economic exclusion.**

However should this Court reject petitioner's prima facie claims, it should reverse to permit a greater examination of past records. The record strongly indicates that the pre-1966 grand jury lists would have shown an even greater racial exclusion.*** It was a denial of due process to deprive petitioner of that opportunity.

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* This restriction did not prevent proof of the systematic exclusion of Newark residents (Table II, 61a) and women (Table I, 60a) from the grand jury master lists. These proofs were easily obtained from the lists in the County clerk's office by counting.

** In addition to the proofs discussed (Statement of the Case, paragraphs 1-12) and set forth in the Tables in the Appendix, Commissioner Howie's admissions that the voter registration lists were not producing enough Negroes, that the Court in 1962 ordered him to obtain more Negroes and laborers for the grand jury, and that he virtually ignored that order, demonstrates the exclusion of those classes at least until 1962.

*** The four grand jury lists analyzed, May, 1966-May, 1967, contained an average percentage of Newark residents of 26.9% (Table II, 61a). The percentage of Negroes on those lists was 6%. Since the great majority of Negroes in Essex County reside in Newark, there should be a correlation between the percentage of Negroes and the percentage of Newark residents on a list.

The percentage of Newark residents on the lists petitioner was prevented from analyzing ranged from 6.8% to 19.3% (Table II, 61a). Since the percentage of Newark residents on those lists is far less than the percentage for 1966-1967, it follows, that the percentage of Negroes would also have decreased. This is especially likely since the correlation between Negroes and Newark residents was stronger in 1966-67 than in prior years. In 1966 Negroes comprised approximately 52% of the population of Newark, compared with 34% in 1960 (S-2, page XI, finding 2).

This analysis also demonstrates long term exclusion.

POINT IV

The denial of the claim that adverse publicity denied petitioner an impartial grand jury presents a basis for certiorari.

Petitioner's arrest was the incident that ignited the massive civil disorders of 1967 in Newark. As a result there was extreme community prejudice against petitioner, who is a Negro, and against the Black community.*

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* While prejudicial statements were made by other public officials, including the Essex County Prosecutor, the statements of New Jersey's Governor Richard J. Hughes are representative. From the outset, the Governor declared the "riot" arrestees' conduct to be "criminal" and went on record as favoring their "rigid prosecution". *The New York Times*, July 17, 1967, p. 11. "The Governor said of the more than 1,000 persons arrested, the majority of them have previous criminal records." *Newark Evening News*, July 16, 1967, p. 12. On the day preceding the convening of the Grand Jury which indicted the petitioner, the Governor asserted, "New Jersey will show its abhorrence of these criminal activities, and society will protect itself by fair, speedy and *retributive justice*." *The New York Times*, July 16, 1967, p. 1. (Emphasis supplied.) Whether intentionally or unintentionally, Governor Hughes brought the authority of his office to bear upon the passions of all prospective jurors at a time when events alone were enough to create a high pitch of hysteria and prejudice in the City of Newark and throughout the United States.

What appeared to be the public attitude of the Governor manifested itself in the Municipal Court of Newark where petitioner was arraigned. On July 21, 1967, the Chief Magistrate of the Municipal Court of Newark refused to allow the filing of criminal complaints brought by the petitioner against the complaining policemen herein. In refusing to perform what, in normal times, is simply a ministerial task, the Chief Magistrate did not base his

(*Footnote continued on following page*)

On July 17, 1967, five days after petitioner's arrest, the Essex County 15th and 16th grand juries convened and were subjected to an inflammatory charge by the Court. See 102 N. J. Super. at 340. There was no *voir dire* of the jurors to determine if they were prejudiced. Nor did the Court instruct the jurors to disregard publicity concerning petitioner and those arrested. *Beck* v. *Washington*, 369 U. S. 541, 547-48. Sitting simultaneously, the grand juries heard 648 cases and returned 556 indictments within a nine day period. 102 N. J. Super. at 341. On July 25 petitioner was indicted.

(*Footnote continued from preceding page*)

decision on a finding of no probable cause on the merits of the complaints. Rather, he said,

> "In these times of stress, with all the havoc and destruction, a policeman killed; a fireman killed and $15 million of damage, I am not accepting a complaint against the police.
>
> "*It was this particular man, if I recall from reading the papers, that originally caused the rioting, when he was arrested and rumors swept through the colored community* that he had been killed. He has been paroled . . . he is alive and there is nothing wrong with him. *The New York Times*, July 22, 1967. (Emphasis supplied.)

Thus, petitioner, whose picture appeared on the cover of the internationally circulated *Time* magazine on July 21, 1967, was prejudged by a judge of the State of New Jersey to be guilty of causing death and destruction in the City of Newark.

The cumulative effect of these and many other published statements introduced as evidence in the hearing below had the effect of casting petitioner in the mold of a criminal whose just reward, perhaps in the mind of jurors, was "rigid prosecution" and "retributive justice." See *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966).

In *Beck* v. *Washington*, *supra* at 546 this Court expressly left open the question of whether one is entitled to indictment by an impartial grand jury. The Court did not reach this question because it did not find on the facts that the grand jury was biased. *Id.* at 548.

However, it is not necessary to show that a nexus exists between the prejudicial publicity and the minds of the jurors. *Marshall* v. *United States*, 360 U. S. 310, 312 (1959); *Pamplin* v. *Mason*, 364 F. 2d 1 (5th Cir. 1966). Certainly the massive adverse publicity offered a "*possible* temptation" that prevented the grand jurors from holding "the balance nice, clear and true between the State and the accused." *Estes* v. *Texas*, 381 U. S. 532, 543 (1965).

In view of the constitutional safeguards protecting the right to a grand jury representative of a cross section of the community, it would indeed be an anomaly if one were not entitled to a fair and impartial grand jury once it was selected. This Court should resolve this question.

This issue is also important because the grand jury proceedings greatly lacked the appearance of justice.

POINT V

The denial of petitioner's claim that the grand and petit jury loyalty oaths deprived him of his constitutional rights presents a basis for certiorari.

The grand jury oath, set forth at 48a-49a, and the petit jury oath, set forth at 49a-50a are virtually identical to the oath struck down in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); see 102 N. J. Super. at 336. It is clear that the New Jersey oaths violate freedom of speech and association protected by the First and Fourteenth Amend-

ments, and that they are void for vagueness and overbreadth. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

The New Jersey Supreme Court did not uphold the constitutionality of the oaths, but ruled that petitioner was not "harmed by the oath requirements." 55 N. J. at 482.* However, the Maryland Supreme Court, in striking down Maryland's jury oaths, held that "an actual showing of prejudice is unnecessary." *State* v. *Madison*, 240 Md. 265, 268-269, 213 A. 2d 880, 882-883 (1965).**

This Court should resolve the split between these State Supreme Courts.

This issue is also extremely important today when many citizens are seriously and honestly questioning the priorities, objectives and operation of the United States Government. Many well intentioned citizens would probably find themselves unable to honestly swear to a vague oath that they do not,

> believe in, advocate . . . the use of . . . other unlawful or unconstitutional means, to . . . make *any* change in the government established in the United States or in this State; and that you are not a member or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of such means . . . (emphasis added).

The "danger of abuse" and adverse effect on the selection process is great. *State* v. *Madison*, *supra* at 883.

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* Petitioner did suffer harm in that he was denied a right to be "tried under what has been determined to be the law of the land." *State* v. *Madison*, 240 Md. at 268-269; 213 A. 2d at 882-883.

** Petitioner has standing to challenge the oaths. (Brief of Defendant-Appellant in State Supreme Court, pp. 30-35.)

CONCLUSION

Petitioner has suffered substantial injustice, and presented federal questions of substantial importance which this Court should resolve. For the reasons submitted petitioner prays that this petition for writ of certiorari be granted.

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APPENDIX A

Opinion of Supreme Court of New Jersey

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. JOHN WILLIAM SMITH, DEFENDANT-APPELLANT.

Argued December 15 and 16, 1969—Decided March 16, 1970.

SYNOPSIS

Prosecutions for assault and battery. Defendant's motion to dismiss indictments was denied by the Superior Court, Law Division, 102 *N. J. Super.* 325. From judgment of conviction, defendant appealed. The Supreme Court held that, even though disorders and lawlessness in city in summer of 1967 were said by some to have been triggered by defendant's arrest and there was extensive publicity at that time, where defendant's trial did not begin until March 1968 and court and counsel took great pains to make certain that those selected as jurors had little or no recollection of any pertinent earlier publicity, defendant was not prejudiced on basis that widespread and adverse publicity surrounding proceedings denied to him a fair trial.

Affirmed.

1. Jury ⇐33(1)

Substantial underrepresentation of Negroes, women, persons of low incomes and residents of Newark on grand or petit jury lists in Essex County did not violate defendant's constitutional rights and render his indictment and conviction invalid.

2. Criminal law ⇐1166½(6)

Even though disorders and lawlessness in city in summer of 1967 were said by some to have been triggered by defendant's arrest and there was extensive publicity at that time, where defendant's trial did not begin until March 1968 and court and counsel took great pains to make certain that those selected as jurors had little or no recollection of any pertinent earlier publicity, defendant was not prejudiced on basis that widespread and adverse publicity surrounding proceedings denied to him a fair trial.

3. Criminal law ⇐1166½(9)

Regardless of constitutionality of statutory oaths required of grand and petit jurors, where defendant was not member of any group which might be excluded because of oaths and there was no suggestion that any prospective grand or petit juror had actually declined to take oaths or had been excluded because of them, probability of prejudice was so remote as to be viewed as nonexistent and was not basis for reversal of conviction. *N. J. S.* 2A:69-1.1, 2A:73-3, *N. J. S. A.*

4. Jury ⇐133

Whether challenges for cause should be heard at side bar out of hearing of prospective jurors was within trial court's discretion.

5. Jury ⇐140

Negro defendant's constitutional rights were not violated by prosecutor's use of peremptory challenges to exclude three Negroes from petit jury, in absence of showing that

the three prospective jurors were excused solely because of their race.

6. Criminal law ⇐867

Where witnesses were sequestered but defense counsel did not call court's attention to desirability of directing each witness not to discuss his testimony with other prospective witnesses until they had testified and court gave no such specific direction, defense motion for mistrial made on day after learning that one witness who had testified had talked with a prospective witness was untimely and denial of motion was not an abuse of discretion, in absence of showing fault on part of state or of prejudice.

7. Criminal law ⇐1170½(1)

Where it appeared that admission of prior statements of defense witness for purposes of neutralizing testimony of witness on trial would not have had any material effect on jury's verdict, exclusion of prior statements did not constitute abuse of trial court's discretion or warrant reversal of conviction.

8. Criminal law ⇐371(12)

Where State asserted that, when defendant's taxicab was stopped and defendant was asked to produce his driver's license, he failed to do so and came out cursing and swinging and defendant said he immediately produced license and offered no resistance, State's evidence relating to his prior traffic offenses and revocation of driver's license was admissible to show motive for conduct alleged by State, in prosecution for assault and battery on police officers. *Rules of Evidence, rule* 55, *N. J. S. A.*

9. Criminal law ⇐1130(6)

Use of reply brief by defense to enlarge on main argument and attack an additional evidential ruling was improper.

Mr. Harris David and *Mr. Raymond Brown* argued the cause for appellant (*Mr. Oliver Lofton*, attorney; *Mr. Edward Carl Broege, Jr.*, of counsel).

Mr. M. Richard Altman, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi*, County Prosecutor of Essex County, attorney).

PER CURIAM: The Essex County Grand Jury returned indictments which charged the defendant John William Smith with having committed assaults and batteries on police officers John De Simone and Vito M. Pontrelli. His motion to dismiss the indictments was denied [*State v. Smith*, 102 *N. J. Super.* 325, 246 *A.* 2d 35 (Law Div. 1968)] and, after trial, the jury failed to agree on the Pontrelli matter but found the defendant guilty of having committed an assault and battery on Officer De Simone. The defendant appealed to the Appellate Division and we certified before argument there.

The officers testified that while they were traveling west in a police car along 15th Avenue, the defendant driving a taxicab behind them went into the eastbound lane and passed them at the intersection of 15th Avenue and South Seventh Street. They followed the cab and brought it to a stop on 15th Avenue between Ninth and Tenth Streets. When they asked the defendant for his license and registration he became abusive and was placed under arrest. Officer De Simone ordered him out of the cab but the defendant first held on to the door and then suddenly opened it, striking it against the officer's chest. The defendant jumped from the cab, cursing and swinging and then struck Officer De Simone in the mouth with his fist. Officer Pontrelli came to De Simone's assistance and, after a struggle, the defendant was subdued and forced into the rear of the police car. The foregoing version of the incident was supported by the testimony of both officers. In addition Officer Citarella, who came quickly to the scene on a police radio call, testi-

fied that he saw De Simone bleeding from his lip and De Simone said that he "got whacked," he "got hit." The trial judge told the witness not to tell what he was told. But *cf. State v. Simmons*, 52 *N. J.* 538, 541–542 (1968). Dr. Kredenser testified that he treated Officer De Simone for a superficial laceration of the lower lip, applied merthiolate, put on some gentian violet and "gave him tetanus toxoid, too."

The defendant denied that he struck either of the officers. He testified that when he passed the police car it was double parked and thereafter, when he was signaled by the police car to stop, he pulled into a vacant space along the curb. He was asked for and produced his driver's license and registration and one of the officers said "you popped the intersection" which the defendant took to mean that "he was playing games." The defendant replied that the police car was double parked but the officers said that it was "in motion." At that point the defendant said "go ahead and do what you want to do" because he figured he "would get a ticket and go back to work." The officers then told him that he was under arrest and he got into the police car. The defendant denied that he cursed or struck either officer but testified that while he was in the police car being driven to the precinct headquarters and later at the headquarters he was beaten by the officers. The officers denied this and, in view of the indictments and the trial issue, the jury was called upon to determine only whether the State had established beyond reasonable doubt that the defendant, when he emerged from the cab, had assaulted the police officers, as they flatly asserted and he flatly denied. The jury credited the officers' testimony that the defendant had struck Officer De Simone and its finding of guilt is not attacked before us as being against the weight of the evidence. *R. R.* 1:5–1 (now *R.* 2:10–1); *State v. Williams*, 39 *N. J.* 471, 490, *cert. denied*, 374 *U. S.* 855, 83 *S. Ct.* 1924, 10 *L. Ed.* 2d 1075 (1963), 382 *U. S.* 964, 85 *S. Ct.* 449, 15 *L. Ed.* 2d 366 (1965).

[1] In support of his appeal, the defendant's brief advances nine points of alleged error which will be dealt with in the order of their presentation. The first asserts that "[t]he substantial underrepresentation of four identifiable classes of citizens, to wit, Negroes, women, persons of low incomes, and residents of Newark" on the grand and petit jury lists violated the defendant's constitutional rights and rendered his indictment and conviction invalid. This point was dealt with adequately by Judge Giuliano in the Law Division; we agree essentially with his opinion (102 *N. J. Super.*, at 341-357) and find no sufficient showing of any constitutional infirmities in the pertinent Essex County grand and petit jury lists. *Cf. State v. Rochester*, 54 *N. J.* 85 (1969) where we affirmed Judge Botter's rejection of a somewhat comparable attack on the Bergen County jury lists and noted specifically the recent steps which have been taken towards truly random selection throughout our entire State not only of petit jurors but of grand jurors as well. 54 *N. J.*, at 91-92.

[2] In his second point the defendant contends that the "widespread and adverse publicity that surrounded the proceedings below" denied to him a fair and impartial "grand jury hearing and trial." The disorders and lawlessness which took place in Newark in the summer of 1967 were said by some to have been triggered by the defendant's arrest. There was extensive publicity but this was largely in July 1967 and the defendant's trial did not begin until the latter part of March 1968. When the jury was being selected for the defendant's trial, court and counsel took great pains to make certain that those selected would be fair and impartial jurors, who had little or no recollection of any pertinent earlier publicity, and who would be in a sound position to decide the case on the evidence and the legal instructions presented during the trial. The *voir dire* was substantially unrestricted, it consumed much time, and careful examination of it supports the conclusion that a fair and impartial jury was actually obtained. See *State v.*

Ravenell, 43 *N. J.* 171, 181 (1964), *cert.* denied, 379 *U. S.* 982, 85 *S. Ct.* 690, 13 *L. Ed.* 2d 572 (1965). We find nothing in the record to indicate that the defendant's right to a fair trial was prejudiced by the earlier publicity; nor do we find anything to indicate that the publicity prejudiced the defendant insofar as the grand jury proceedings were concerned. The grand jury would have no reason for not returning indictments in view of the testimony of the police officers and there is nothing whatever before us to suggest that the indictments were returned on any improper basis or in any improper manner. See 102 *N. J. Super.*, at 339–44; *cf. State v. Borg*, 9 *N. J. Misc.* 59 (Sup. Ct. 1931).

[3] The defendant's third point attacks the constitutionality of the statutory oaths required of grand and petit jurors. *N. J. S.* 2A:73-3; *N. J. S.* 2A:69-1.1. The Law Division expressly held, *inter alia*, that the oath requirements were constitutional. 102 *N. J. Super.*, at 335–37. Construed and applied narrowly [(*cf. Application of Walter Marvin, Jr.*, 53 *N. J.* 147, *cert.* denied, 396 *U. S.* 821, 90 *S. Ct.* 62, 24 *L. Ed.* 2d 72 (1969))], they should readily withstand constitutional attack. See 102 *N. J. Super.*, at 336–337; *Konigsberg v. State Bar of California*, 366 *U. S.* 36, 49–52, 81 *S. Ct.* 997, 6 *L. Ed.* 2d 105, 116–117 (1961); *American Communications Assoc. v. Douds*, 339 *U. S.* 382, 412–413, 70 *S. Ct.* 674, 94 *L. Ed.* 925, 951–952 (1950). However, we need not pursue the issue here for we are satisfied that the defendant was not, in any event, harmed by the oath requirements. He was not a member of any group which might be excluded because of the oaths (102 *N. J. Super.*, at 333) and, more importantly, there was no suggestion that any prospective grand or petit jurors had actually declined to take the oaths or had been excluded because of them. The circumstances make it evident that the "probability of prejudice," referred to in the defendant's brief, was entirely absent; indeed the danger of prejudice was so remote as to be viewed as nonexistent.

[4] In his fourth point, the defendant asserts that the trial court improperly refused to allow his counsel to make challenges for cause out of the hearing of prospective jurors. The first time counsel asked to make a challenge for cause at the bench he was permitted to do so and the challenge was sustained. The second time the court told him to make his challenge in open court and it was also sustained; it may be that the court, knowing its probable ruling in this particular instance, though time would be saved that way. Later counsel made challenges for cause without requesting permission to come to the bench. When at one point counsel said that he felt compelled to exercise peremptory challenges because the court had instructed him "that challenges for cause could not be heard at side bar," the trial judge said "I did not say that." Later when counsel asked, he was again permitted to come to the bench for the purpose of making a challenge for cause. All in all it may not fairly be said that the trial court had made any general ruling prohibiting challenges for cause at side bar. The subject matter was clearly one within the trial court's discretion and there is nothing to indicate any improper exercise of that discretion or any prejudice to the defendant.

[5] We find no merit in the defendant's fifth point which asserts that the prosecutor's use of peremptory challenges to exclude Negroes (the defendant was a Negro) from the petit jury violated his constitutional rights. The prosecutor and defense counsel each had ten peremptory challenges to use generally as they pleased. *R.* 1:8-3(d). They were not called upon to express any reasons and both of them exercised their peremptory challenges freely and without any indications whatever as to their reasons. See *Swain v. Alabama*, 380 *U. S.* 202, 220, 85 *S. Ct.* 824, 836, 13 *L. Ed.* 2d 759, 772 (1965): "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." The defendant sets forth, as a fact, that only three Negroes were called on the *voir dire* and that the pros-

ecutor exercised peremptory challenges with respect to all three. But that fact without more does not establish any practice of systematic exclusion of Negroes, nor does it establish, as the defendant contends, that the three prospective jurors were excused "solely because of their race"; indeed our examination of the *voir dire* suggests that in at least one of the three instances there was an obvious affirmative reason, wholly unrelated to race, for the prosecutor's exercise of his peremptory challenge. See *Swain v. Alabama, supra*, where the Court, in rejecting a constitutional attack on the prosecutor's exclusion of Negroes from a particular jury through the use of peremptories, said:

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. 380 *U. S.* at 222, 85 *S. Ct.* at 837, 13 *L. Ed.* 2d at 773-774.

[6] The defendant's sixth point urges that witnesses for the State had breached the trial court's sequestration order and that a mistrial should have been declared for that reason. On defense counsel's motion the trial court had directed that the witnesses be sequestered. *Cf. State v. Di Modica*, 10 *N. J.* 404, 413 (1963). Prospective witnesses were kept out of the courtroom but defense counsel did not call the court's attention to the desirability of directing each witness not to discuss his testimony with other prospective witnesses until they had testified and apparently the trial court gave no such specific direction. See *State v. Williams*, 29 *N. J.* 25, 46 (1959). After Officer De Simone testified, he met Officer Pontrelli during luncheon. When

later Pontrelli was called by the State to testify, defense counsel knew that he had talked with De Simone but raised no objection before the trial court. Instead, during cross-examination, he asked Pontrelli whether he had spoken with De Simone and Pontrelli said he had but that De Simone had merely related some of the questions asked of him without relating his answers. On the following day, at the conclusion of another witnesses' testimony, defense counsel made a belated motion for mistrial. It was untimely and, in any event, the trial court properly exercised its discretion in denying it. See *State v. Williams, supra,* where the Court noted that violation of a sequestration order "without fault on the part of the State, would not constitute error; at least it is difficult to conceive of a case in which it would." 29 *N. J.*, at 46–47. See also *State v. Michalis,* 99 *N. J. L.* 31, 34 (Sup. Ct. 1923). Here there was no fault on the part of the State and no showing of prejudice. We are satisfied that the defendant's sixth point lacks substance and presents no ground for reversal.

The defendant's seventh point attacks an evidential ruling during Deputy Chief Melchior's testimony as an abuse of the trial court's discretion. Several witnesses for the State had testified that Officer De Simone had a laceration of the lip whereas several defense witnesses said they saw no evidence of such injury. The defense called De Simone as its witness and he testified that the defendant's blow struck him in the mouth; that the blow struck his lower lip breaking the skin on the inside; and that the break in the skin was not visible from the outside although there was externally visible swelling or puffiness. After De Simone completed his testimony the defense called Melchior who testified that when he saw De Simone at precinct headquarters De Simone had a small cut and swelling on the lower lip. He further testified that the cut was on the outside and was visible to him. Defense counsel then sought to inquire about earlier testimony in a separate proceeding where Melchior allegedly said that De Simone's injury was

to the upper lip rather than, as he stated on the witness stand, to the lower lip. At that point, the trial court asked defense counsel whether he was seeking to impeach his own witness and counsel replied that he had called Melchior "as a hostile witness in this matter." When the court expressed the view that the witness was not hostile, counsel proceeded to inquire about the earlier testimony but an objection to the inquiry was sustained.

In the defendant's brief, counsel acknowledges that his stated justification for seeking to impeach Melchior's testimony was not legally sound but he now urges that he should have been permitted to proceed under New Jersey's rule relating to "neutralization." See *Evidence Rule* 20; *State v. Gallicchio*, 44 *N. J.* 540, 546 (1965); *State v. Baechler*, 52 *N. J. Super.* 378, 389 (App. Div. 1958). In *Gallicchio* the Court pointed out that where a party calls a witness who surprises by testifying contrary to a prior statement, to the harm of the proponent's case, the proponent may be permitted to use the prior statement for the purpose of neutralizing or cancelling out the witness' surprising testimony on the stand. *Evidence Rule* 20 specifies that "the party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised." And *Gallicchio* noted that "the proponent cannot claim harm if the present testimony is only contrary to that which the proponent expected or was attempting to elicit or that the witness failed to render the expected assistance" and that to constitute harm "the witness must give testimony asserting the existence or nonexistence of a material fact contrary to the proponent's case." 44 *N. J.*, at 546.

It seems clear that the defendant suffered no harm within the principles set forth in *Gallicchio* or indeed in any realistic sense. Melchior's testimony varied from that of De Simone and, in his summation to the jury, defense counsel made the most of the variation. Thus he pointed to De Simone's testimony that his laceration was not externally

visible and to Melchior's conflicting testimony, and he referred to this as "one of the basic inconsistencies" in the State's case which, he urged to the jury, did not measure up to the required standard of proof beyond a reasonable doubt. If Melchior's testimony had been neutralized, counsel could hardly have made any effective use of it in his summation. In any event, the entire matter of Melchior's testimony appears to us to be minor and nonprejudicial in the light of the full record; we are satisfied that if the prior statement had been admitted for neutralization purposes it would not have had any material effect on the jury's verdict and that its exclusion clearly did not constitute an abuse of the trial court's discretion calling for reversal of the defendant's conviction.

[8] The eighth point asserts that the trial court erred in permitting the introduction of evidence relating to prior traffic offenses. The State's evidence indicated that when the defendant's car was stopped and he was asked to produce his driver's license and automobile registration he failed to do so but came out cursing and swinging. The defendant denied this and said that he immediately produced his license and registration and offered no resistance. In attacking his version, the State, on cross-examination, brought out evidence indicating a motive and an explanation of his behavior, namely, his driver's license had been revoked and therefore it may fairly be inferred that he was concerned about an offense much more serious than the manner of his driving along 15th Avenue and one which would endanger his continued operation as a cab driver.

The defendant contends that the evidence of his being on the revoked list as a result of his previous "accumulation of twelve points," was inadmissible under *Evidence Rule* 55 which states that "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion * * *." However

the same rule contains an explicit exception which states that "such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident." See *State v. Kociolek*, 23 *N. J.* 400, 418–420 (1957); *State v. Harris*, 105 *N. J. Super.* 319, 322–323 (App. Div. 1969). The evidence was admissible within this exception and, in the context of the entire record, we find neither error nor prejudice in the manner in which the trial court dealt with it.

[9] The ninth and final point in the defendant's brief urges that the judgment of conviction be reversed "because of the accumulation of errors committed below"; [*State v. Orecchio*, 16 *N. J.* 125, 129 (1954)]; this point must of course fall in the light of our disposition of the defendant's earlier points. In a reply brief purportedly responding to the State's answering brief, the defendant enlarged on his main argument and attacked an additional evidential ruling of minor nature. Such use of a reply brief is improper, and, in any event, nothing was presented of any substantial merit or of sufficient significance to warrant discussion here. As we have already indicated, the trial was a full and fair one and was free from error prejudicially affecting the defendant's legal rights. The issue was a factual one with little complexity and the jury decided it in favor of the State and against the defendant. We cannot say on the record before us that the jury's finding of guilt was either unjust or infirm and accordingly our clear appellate responsibility is to declare that the judgment of conviction below be and hereby is:

Affirmed.

For affirmance—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, HALL, SCHETTINO and HANDMAN—7.

For reversal—None.

Opinion of the Superior Court of New Jersey, Appellate Division

THE STATE OF NEW JERSEY, PLAINTIFF, v. JOHN WILLIAM SMITH, *ET AL.*, DEFENDANTS.

Superior Court of New Jersey
Law Division

Decided June 28, 1968.

SYNOPSIS

Prosecutions for assault and battery. The defendants moved to dismiss indictment. The Superior Court, Law Division, Giuliano, A. J. S. C., held that defendants did not have standing to challenge constitutionality of loyalty oath required of grand and petit jurors, and that oath was not unconstitutional in any case, that transcript of grand jury proceedings was not required, and that evidence established that there had been no misconduct by grand jury and that there had not been discrimination in composition and selection of grand and petit jurors.

Motions denied.

1. Constitutional law ⇨251
Grand jury ⇨2

Due process does not require State to adopt grand jury system and State may abolish grand juries without violating Fourteenth Amendment and has considerable latitude in type of grand jury system to establish. *U. S. C. A. Const. Amend.* 14.

2. Constitutional law ⇨42

If defendant is not member of group excluded from grand jury, exclusion will not be held unconstitutional as to him unless he was actually prejudiced.

3. Constitutional law ⇨42

Question of standing in state court to raise constitutional question is to be determined by state law.

4. Constitutional law ⇨42

Defendants who were not in class of persons allegedly excluded by grand jurors' loyalty oath did not have standing to challenge constitutionality of statute requiring oath. *N. J. S.* 2A:69–1.1, 2A:73–3, *N. J. S. A.*; *U. S. C. A. Const. Amends.* 1, 5, 14.

5. Grand jury ⇨1

Juries, in particular grand juries, are arms of court and perform *quasi*-judicial function.

6. Grand jury ⇨1

It is specific function of grand jury to find and return indictment or presentment in open court to assignment judge.

7. Criminal law ⇨866
Grand jury ⇨15, 33
Jury ⇨46

Grand jury and petit jury must accept law as written or charged, and jurors themselves must be loyal to government and laws which it promulgates.

8. Constitutional law ⇨90
Grand jury ⇨2
Jury ⇨148(1)

Statutes requiring loyalty oath of grand and petit jurors are not unreasonable restrictions of First Amendment freedoms. *N. J. S.* 2A:69–1.1, 2A:73–3, *N. J. S. A.*; *U. S. C. A. Const. Amend.* 1.

9. Constitutional law ⇨257
Grand jury ⇨40

Presence of stenographer and recording of testimony adduced before grand jury is of permissive nature, and failure to make stenographic record did not deprive defendants of

rights under Fifth, Sixth and Fourteenth Amendments. *U. S. C. A. Const. Amends.* 5, 6, 14.

10. Indictment and information ⇐10.2(6)

Grand jury proceedings are presumed valid unless there is proof rebutting presumption.

11. Indictment and information ⇐144

Evidence on motion to dismiss indictments established that defendant had not been prejudiced, through effect on grand jury, by publicity surrounding civil disturbance out of which indictments arose.

12. Grand jury ⇐1

Grand jury acts as sword so that those who are suspected of wrongdoing may be properly brought to trial and as shield to protect people from arbitrary prosecution.

13. Criminal law ⇐1166(2)

Charge to grand jury considering Newark civil disturbance, pointing out certain acts of lawlessness, was not prejudicial to defendants, where it was not directed at any individual or class of persons.

14. Indictment and information ⇐140(2)

Evidence in proceeding on motions to quash indictments established that grand juries had spent sufficient time deliberating on each case presented. *N. J. S. 2A:73-3, N. J. S. A.*

15. Indictment and information ⇐10.2(1)

That prosecutor downgraded several cases, by dismissing indictment and filing complaint for lesser offense, did not support inference that there was insufficient evidence before grand jury to indict defendants.

16. Grand jury ⇐41

Grand jury proceedings are generally secret, and veil of secrecy may be lifted when court is satisfied that policy of secrecy should be subordinate to search for whole truth.

17. Indictment and information ⇐140(1)

Defendants who charged grand juries with misconduct could be permitted to inquire as to whether there was some legal evidence before grand jury to support indictment and whether grand jury spent sufficient time deliberating on each case.

18. Indictment and information ⇐102(7)

Defendants who challenged indictments would not be permitted to inquire as to competency and adequacy of evidence before grand jury.

19. Grand jury ⇐11

Court was not required to inquire of each grand juror regarding possibility of prejudice against defendants or members of their class.

20. Jury ⇐62(3)

Jury commissioners have discretion in selection of jurors and courts will not substitute their own formula for that chosen by jury commissioners in absence of proof of bad motive.

21. Constitutional law ⇐221

Jury ⇐33(f)

Juries must be truly representative of community and deliberate and systematic exclusion of Negroes or other qualified class of persons is deprivation of equal protection. *U. S. C. A. Const. Amend.* 14.

22. Jury ⇐39(3)

Defendant is not entitled to have one or more persons of his race or class on jury panel, and does not have right to have jury composed in whole, in part, or proportion to any specific racial, economic or geographical group, since he has only right to jury selected without discrimination or bias.

23. Jury ⇐121

All jury discrimination cases present question of fact.

24. Indictment and information ⇦10.2(6)

There is presumption in favor of validity of indictment and grand jury panel.

25. Indictment and information ⇦140(2)

Defendant who asserts that there has been discrimination in selection of grand jury panel has burden of proving it, but once he establishes *prima facie* case of discrimination, burden shifts to prosecution to explain disparity.

26. Constitutional law ⇦257, 267

Grand jury ⇦8

Jury ⇦62(3)

Practices and procedures employed in selection of grand and petit jurors, with prospective grand jurors' names being solicited by "key-man" system from various organizations, with supplementation from voter registration lists, and names of prospective petit jurors being taken solely from voter registration lists, with no direct evidence for systematic exclusion of Negroes, there being no markings on lists from which names were selected, did not violate Federal Constitution or point to discrimination. *U. S. C. A. Const. Amends.* 1, 14; *Const.* 1947, *Art.* 1, *par.* 8; *N. J. S.* 2*A*:69–1, 2, 2*A*:70–1, *N. J. S. A.*

27. Indictment and information ⇦140(2)

Evidence in proceeding on motions to quash indictments, indicating disparity between proportions of females and Negroes in county and proportions of Negroes and females chosen as prospective grand jurors, was insufficient to support *prima facie* case of discrimination in selection of grand jury panels.

28. Criminal law ⇦549

Application of mathematical techniques in proof of facts of criminal case should be approached with caution and restraint.

29. Jury ⇨120

Evidence showing disparity between proportion of women in county and proportion of women chosen as prospective petit jurors was insufficient to show arbitrary or deliberate exclusion of women from jury lists.

30. Jury ⇨120

Evidence, including evidence of disparity between proportion of Newark residents to residents of county and proportion of Newark residents chosen as prospective petit jurors was insufficient to establish discrimination. *N. J. S.* 2A:69–2, *subd. g*, 2A:70–1, *N. J. S. A.*

31. Jury ⇨62(3)

Use of voter registration lists as source of names for jury service is valid even though qualified members of particular class are under-represented on voter registration lists.

32. Jury ⇨120

Evidence, including evidence of disparity between proportion of Negroes or persons in lower economic status in county and proportion of Negroes or persons of lower economic status chosen as prospective jurors was insufficient to establish systematic exclusion, for lack of evidence of proportion of Negroes and persons of lower economic status on voter registration lists from which jurors were chosen.

Mr. Andrew F. Zazzali, Jr., Assistant Prosecutor for plaintiff, State of New Jersey (*Mr. Joseph P. Lordi*, Essex County Prosecutor, attorney).

Mr. Harris David and Mr. Mark Gasarch for defendants (*Mr. Oliver Lofton*, Director, Newark Legal Services Project, attorney).

GIULIANO, A. J. S. C. This is a consolidated motion to dismiss 98 indictments returned by the 15th and 16th Grand Juries of the September 1966 term sitting during the May 1967 session.

On September 29, 1967 defendant John William Smith filed with the court a motion to dismiss two indictments returned against him by the Essex County grand jury. Each indictment charged him with assault and battery upon a police officer, contrary to the provisions of *N. J. S.* 2A:90–4. Thereafter, approximately 94 other defendants filed similar motions to dismiss the indictments returned against them by an Essex County grand jury. All the aforesaid indictments involved defendants arrested during the civil disturbance which occurred in Newark, New Jersey, during the month of July 1967. Since all the motions in question involve common questions of law and fact, this court ordered that this matter be consolidated for purposes of argument, presentation and findings. A stipulation to this effect was signed by all defense attorneys and filed with the court on October 10, 1967.

In order that there would be no delay in the disposition of these indictments, the court ordered at the first hearing that all indictments returned against defendants would proceed to trial. Since the filing of this motion, the indictments returned against defendant John William Smith have been disposed of by trial. A jury returned a verdict of guilty on indictment 2678–66 and were in disagreement on indictment 2679–66. Of the remaining indictments, 71 were dismissed on motion of the Essex County Prosecutor, and most of the defendants in this group were charged with a lesser offense under the Disorderly Persons Act. In addition, 16 defendants were tried, convicted and sentenced, 6 were tried and found not guilty, and 1 failed to appear in court and a bench warrant was issued for his arrest. The remaining indictments have not been disposed of at this time.

This motion presents basically four issues concerning (1) the loyalty oath of grand and petit jurors; (2) the lack of a

transcript of the grand jury proceedings; (3) the conduct of the grand jury in deliberating and voting on the indictments in question, and (4) the composition and selection of grand and petit juries. Each issue is discussed in detail under its appropriate heading.

THE OATH OF THE GRAND AND PETIT JURORS

The grand jurors who indicted defendants were required to take an oath pursuant to *N. J. S.* 2A:73-3. This oath provided in pertinent part as follows:

> "* * * you do not believe in, advocate or advise the use of force or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates or advises the use of such means * * *."

Petit jurors are required to take a similar oath as provided in *N. J. S.* 2A:69-1.1.

[1] Defendants contend that this oath is violative of the Fifth and Fourteenth Amendments to the United States Constitution because it requires neither specific intent to subvert or active membership in subversive groups. Furthermore, they contend that the requirement of this oath causes an unconstitutional exclusion from jury service of those persons who believe in the unlawful overthrow of our government or persons who are inactive members of a subversive organization. Defendants have submitted other arguments in support of this contention, but this court finds them without merit in law and fact. In particular, defendants contend that the oath denies them the right to be indicted by a grand jury which is constituted in accordance with the Fourteenth Amendment to the Constitution of the United States. The "due process" clause does not require the states to adopt the grand jury system. *Lem Woon v. State of Oregon*, 229 *U. S.* 586, 33 *S. Ct.* 783, 57 *L. Ed.* 1340 (1913). Furthermore, a state may abolish grand juries without violating the Fourteenth Amendment. *Hurtado v. People of State of*

California, 110 *U. S.* 516, 4 *S. Ct.* 111, 292, 28 *L. Ed.* 232 (1883). A *fortiori*, a state has considerable latitude in the type of grand jury system it may establish.

In addition, defendants contend in their moving papers that the oath created "an effect of instilling in the minds and consciences of the grand jurors * * * a disregard of the Constitution of the United States." How this "effect" resulted was not explained to the court. Finally, defendants argue that the oath, coupled with the court's charge to the grand jury and certain alleged inflammatory statements by public officials, prejudiced them. As to this argument, defendants failed to show how they were prejudiced and did not support this position with accurate authority. Therefore, these contentions were not considered by the court.

On oral argument of this matter counsel stipulated that no defendant is a member of the class of persons allegedly excluded by the oath, *i. e.*, persons who believe in the unlawful overthrow of our government or persons who are inactive members of a subversive organization. In addition, there was no evidence presented to this court that any member of the grand jury which indicted defendants refused to take the required oath and was thereby excluded from jury service. These facts present the question of whether defendants have standing to challenge the constitutionality of the oaths. Defendants' position is that they have standing to challenge the oath because of its chilling effect on the First Amendment rights of free speech, press, assembly and belief. Thus, they contend they do not have to show prejudice because the oath results in an illegal discrimination and exclusion.

[2] Under the present state of the law as espoused by the United States Supreme Court, a federal court has "never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class." *Fay v. People of State of New York*, 332 *U. S.* 261, 287, 67 *S. Ct.* 1613, 1627, 91 *L. Ed.* 2043 (1947); *Rawlins v. State of Georgia*, 201 *U. S.* 638, 26 *S. Ct.* 560, 50 *L. Ed.* 899 (1906). The apparent rationale for this rule is that if a

defendant is a member of the excluded class, the danger of prejudice is great enough for a court to hold that the exclusion is unconstitutional without a showing of actual prejudice. However, if a defendant is not a member of the excluded group, the danger of prejudice is not great. Therefore, before the court will hold the exclusion unconstitutional as to a defendant, it must find that he was actually prejudiced thereby.

This doctrine of standing has been followed in several states. See *State v. Lee*, 228 *La.* 724, 84 *So. 2d* 169, 170 (*Sup. Ct.* 1955); *People v. White*, 43 *Cal. 2d* 740, 278 *P. 2d* 9, 17 (*Sup. Ct.* 1954), *certiorari* denied 350 *U. S.* 875, 76 *S. Ct.* 120, 100 *L. Ed.* 774 (1956); *Griffin v. State*, 183 *Ga.* 775, 190 *S. E.* 2 (*Sup. Ct.* 1937); *Haraway v. State*, 203 *Ark.* 912, 159 *S. W. 2d* 733 (*Sup. Ct.* 1942), *certiorari* denied 317 *U. S.* 648, 63 *S. Ct.* 42, 87 *L. Ed.* 521 (1942); *State v. Koritz*, 227 *N. C.* 552, 43 *S. E. 2d* 77 (*Sup Ct.* 1947), *certiorari* denied 332 *U. S.* 768, 68 *S. Ct.* 80, 92 *L. Ed.* 354 (1947); *State v. Jones*, 5 *Terry* 372, 44 *Del.* 372, 57 *A. 2d* 109, 113 (*Del.-O. & T.* 1947); *Commonwealth v. Dyca*, 312 *Pa.* 101, 165 *A.* 825 (*Sup. Ct.* 1933); *State v. Clifton*, 247 *La.* 495, 172 *So. 2d* 657 (*Sup. Ct.* 1965). Likewise, this doctrine is the procedural law of New Jersey. *State v. James*, 96 *N. J. L.* 132, 144 (*E. & A.* 1921). See also *State v. Lee*, 74 *N. J. L.* 852 (*E. & A.* 1905), affirmed 207 *U. S.* 67, 28 *S. Ct.* 22, 52 *L. Ed.* 106 (1907). The *James* case involved a situation in which women were allegedly excluded from the jury panel by the jury commissioners. The Court of Errors and Appeals held that defendant could not raise the question that the exclusion of women from jury duty violated the Fourteenth Amendment to the United States Constitution because he was not a member of the alleged excluded class. Likewise, in the case at bar defendants cannot raise the question of exclusion because none of them is a member of the excluded class.

[3] On the other hand, defendants contend they need not show actual prejudice by the application of the law or

that they are members of the allegedly excluded class, and rely on *Thiel v. Southern Pacific Co.*, 328 *U. S.* 217, 66 *S. Ct.* 984, 90 *L. Ed.* 1181 (1946), and *Ballard v. United States*, 329 *U. S.* 187, 67 *S. Ct.* 261, 91 *L. Ed.* 181 (1946). In both these decisions the United States Supreme Court acted in the exercise of its power of supervision over the administration of justice in the federal courts. The question of standing in a state court is to be determined by state law. In addition, defendants rely heavily on the case of *State v. Madison*, 240 *Md.* 265, 213 *A. 2d* 880 (1965), wherein the Maryland Supreme Court held that the selection of a grand jury from persons who were required to show their belief in the existence of God was violative of the Federal Constitution. Although the defendant in *Madison* was not a member of the excluded class, *i. e.*, he was a believer in a Supreme Being, the Maryland court maintained that he still had standing to challenge the aforesaid requirement for jury duty. This court finds that *Madison* on this procedural point is not binding in the present case and concludes that defendants herein are required to show prejudice before the oaths in question are declared invalid and unconstitutional.

[4] Since defendants have failed to show prejudice and in view of the above-cited cases this court concludes that defendants do not have standing to challenge the constitutionality of *N. J. S.* 2A:93-3 and *N. J. S.* 2A:69-4.1.

Assuming, *arguendo*, that defendants do have standing to challenge those statutes, this court is still constrained to find them constitutional for the following reasons:

Loyalty oaths have long been the subject of litigation. Within the past few years this interest was renewed by the United States Supreme Court regarding loyalty oaths required of teachers. See *Keyishian v. Board of Regents of University of State of New York*, 385 *U. S.* 589, 87 *S. Ct.* 675, 17 *L. Ed. 2d* 629 (1967); *Whitehill v. Elkins*, 389 *U. S.* 54, 88 *S. Ct.* 184, 19 *L. Ed. 2d* 228 (1967); *Elfbrandt v. Russell*, 384 *U. S.* 11, 86 *S. Ct.* 1238, 16 *L. Ed. 2d* 321 (1966); *Baggett v. Bullitt*, 377 *U. S.* 360, 84 *S. Ct.* 1316,

12 *L. Ed.* 2d 377 (1964). *Keyishian* dealt with an oath almost identical to the oath required of grand and petit jurors in the case at bar. The United States Supreme Court held that the oath as applied to teachers was unconstitutionally vague and violative of the First Amendment to the United States Constitution. It is apparent that the court gave special consideration to the "sensitivity" of a teacher's position in the academic community. The court, through Mr. Justice Brennan, said:

"Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (385 *U. S.* at *p.* 603, 87 *S. Ct.* at *p.* 683)

See also *Sweezy v. State of New Hampshire*, 354 *U. S.* 234, 77 *S. Ct.* 1203, 1 *L. Ed.* 2d 1311 (1957).

Therefore, this Court must consider whether jurors are also to be given this special consideration. In doing so the court must weigh the State's interest in having loyal jurors against First Amendment rights.

[5–7] Juries, in particular grand juries, have always been considered an arm of the court; they perform a *quasi*-judicial function in our present judicial structure. *In re Jeck*, 26 *N. J. Super.* 514 (*App. Div.* 1953). As provided in *R. R.* 3:3–1 *et seq.*, it is the specific function of the grand jury to find and return an indictment or presentment in open court to the assignment judge. In so doing the grand jury must accept the law as it is written; otherwise the criminal laws would be virtually unenforceable. Likewise, the petit jury must accept the law as it is charged to them by the trial judge; otherwise their findings would be inconsistent and chaotic. Therefore, in order for the jury system to function, jurors themselves must be loyal to the government and the laws which it promulgates.

[8] When considering the above it becomes apparent that the real interest of the State is in its right to self-preserva-

tion. For if the jury fails to function properly and condones criminal acts, anarchy and lawlessness are sure to result and the jury system itself would be destroyed. This court therefore finds that the State's interest of self-preservation necessitates a limitation on First Amendment freedoms in this particular area of our governmental structure. Limitations on First Amendment Freedoms have been deemed lawful and necessary in similar situations where the State's interest was declared supreme. See, for example, *American Communications Ass'n v. Dowds*, 339 *U. S.* 382, 70 *S. Ct.* 674, 94 *L. Ed.* 925 (1950); *Konigsberg v. State Bar of California*, 366 *U. S.* 36, 81 *S. Ct.* 997, 6 *L. Ed. 2d* 105 (1961); *In re Application of Marvin*, 97 *N. J. Super.* 62 (*App. Div.* 1967). Therefore, if this issue were properly presented, this court would conclude that the oath required of grand and petit jurors is constitutional and not an unreasonable restriction of First Amendment freedoms.

TRANSCRIPT OF THE GRAND JURY PROCEEDINGS

There was no stenographic record made of the grand jury proceedings which resulted in the indictment of defendants. Movants contend that the failure to make a stenographic record or otherwise record these proceedings has deprived defendants of their rights contemplated by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. They are unable to cite law in support of this contention.

The present state of the law in the federal courts is that "There is no constitutional requirement that grand jury proceedings be transcribed." *United States v. Cianchetti*, 315 *F. 2d* 584, 591 (2 *Cir.* 1963). See also *United States v. Hensley*, 374 *F. 2d* 341 (6 *Cir.* 1967); *McCaffrey v. United States*, 372 *F. 2d* 482 (10 *Cir.* 1967). The attendance of a stenographer at a grand jury proceeding in the federal courts is permissive rather than mandatory. *United States v. Borys*, 169 *F. Supp.* 366, 368 (*D. Alaska* 1959); *United States v. Rosen*, 259 *F. Supp.* 942 (*S. D. N. Y.* 1966).

[9] The law of this State is in accord with the above-cited cases. The presence of a stenographer and the recording of testimony adduced before the grand jury is clearly of a permissive nature. *State v. DiModica*, 40 *N. J.* 404, 412 (1963). Although *R. R.* 3:3-6 now provides otherwise, this court is compelled to hold that the failure to provide a stenographic record of the grand jury proceedings did not violate any of the constitutional rights of defendants.

THE GRAND JURY PROCEEDINGS

The third major contention of defendants involves alleged misconduct on the part of the 15th and 16th Grand juries and the Court, allegedly resulting in a denial of their rights as guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution and N. J. Const. (1947), Art. I, Par. 8, and in violation of *N. J. S.* 2A:73-3 which sets forth the oath and duties of the grand jurors. More specifically, defendants contend they were denied the right to an indictment by an impartial grand jury because (1) the grand jury was prejudiced against defendants by the adverse publicity surrounding the Newark civil disturbance; (2) the charge by the court to the grand jury was biased against defendants; (3) the grand jury spent insufficient time deliberating on each indictment, and (4) the court failed to inquire of grand jurors regarding the possibility of their being prejudiced against defendants.

There is no doubt that the Newark civil disturbance and the similar outbreaks of lawlessness which occurred throughout the country during the summer of 1967 received nationwide publicity. Likewise, there is no question that certain public officials made statements condemning the numerous criminal activities which occurred spontaneously at that time. Thus, the question presented is whether this publicity so adversely affected the grand juries which indicted defendants that it caused a violation of due process of law.

In support of this contention that the grand jury was prejudiced against them by the publicity surrounding the Newark disturbances, defendants cite numerous cases regarding a fair trial and free press. These cases are not applicable to the case at bar because they concern themselves with the trial of the case and not the indictment process itself. Furthermore, this line of cases condemns as unconstitutional those situations wherein the trial itself was conducted in a "carnival atmosphere", thereby creating the probability of prejudice abhorent to due process of law. *Sheppard v. Maxwell*, 384 *U. S.* 333, 358, 86 *S. Ct.* 1507, 16 *L. Ed.* 2d 600 (1966). See also *Rideau v. State of Louisiana*, 373 *U. S.* 723, 83 *S. Ct.* 1417, 10 *L. Ed.* 2d 663 (1963); *Turner v. State of Louisiana*, 379 *U. S.* 466, 85 *S. Ct.* 546, 13 *L. Ed.* 2d 424 (1965); *Estes v. State of Texas*, 381 *U. S.* 532, 85 *S. Ct.* 1628, 14 *L. Ed.* 2d 543 (1965).

[10, 11] The proceedings of the grand jury are presumed valid unless proof is submitted to the court which rebuts this presumption. *State v. Graziani*, 60 *N. J. Super.* 1 (*App. Div.* 1959), affirmed 31 *N. J.* 538 (1960). In the case at bar there has been no indication to the court that the grand jury proceedings in question were not conducted in the usual solemn manner. Likewise, there has been no evidence presented to the court that any indictment involved herein was the result of bias, prejudice or malice as was condemned in the case of *State v. Borg*, 9 *N. J. Misc.* 59 (*Sup. Ct.* 1931). On the contrary, the news media merely reported the Newark civil disturbances as accurately as possible under the circumstances. The fact of news publicity alone cannot be said to have created such a "probability of prejudice", that the grand jury proceedings should be deemed "inherently lacking in due process." See *Estes v. State of Texas*, *supra*, 381 *U. S.* at *pp.* 542–543, 85 *S. Ct.* 1628. The court therefore finds that defendants were in no way prejudiced by the publicity surrounding the Newark Civil disturbance.

Defendants further contend that the language of the charge by the court to the 15th and 16th grand juries was

biased against defendants. This contention is not supported by any accurate authority. Those portions of the charge claimed objectionable are as follows:

"The Court has requested that you appear before it this morning to be charged and instructed relative to the many killings, serious injuries inflicted upon individuals, the burning and destruction of personal property, the plundering and looting of business establishments and general lawless and riotous conduct by many individuals * * *. There is no doubt that certain guarantees and protections cloak all citizens under the Federal and State Constitutions, but these constitutional rights were never meant to be shields for acts of criminality. They were never intended to be licenses for burning, shooting, looting, plundering and murder. * * *

Certain events have taken place in the City of Newark which demand your immediate attention and consideration. I do not have to remind you of the complete disregard for law and order that has been hovering over this municipality. Facts which have come to the attention of the Court indicate a pattern of lawlessness which cannot be permitted to go unnoticed by those charged with the administration of justice * * *"

[12] It is well established in our system of jurisprudence that the grand jury performs a two-fold function. It acts as a sword so that those who are suspect of wrongdoing may be properly brought to trial, and as a shield to protect the people from arbitrary prosecution. *State v. Sibilia*, 88 *N. J. Super.* 546, 550 (*Cty. Ct.* 1965). In conformance therewith the court charged each grand jury that it was the duty of the grand jury to return an indictment in each instance where the State had presented a *prima facie* case with "due process as the beacon." Likewise, the court charged that where the State failed to present a *prima facie* case it was equally the grand jury's duty not to indict. The court further charged that

"You should without fear or favor, prejudice or sympathy examine the evidence presented to you in each case and determine whether or not it merits your returning an indictment against the accused."

[13] When this charge is considered in its totality, this court concludes it did not prejudice defendants, for the

charge was in no way whatsoever directed as an attack at any individual or class of persons. The charge merely pointed out that certain acts of lawlessness had occurred in Essex County and as a result thereof each grand jury was summoned to investigate the matter and act in accordance with their oaths.

[14] Defendants further contend that the 15th and 16th grand juries spent insufficient time deliberating on each case presented to them before returning an indictment, thereby resulting in a violation of the grand jurors' oath as set forth in *N. J. S.* 2A:73-3. This argument is unfounded in fact and law. The 15th grand jury heard cases resulting from the Newark civil disturbances for a period of nine full days. Out of the 386 cases presented to them by the Essex County Prosecutor's Office, 331 true bills were returned to the assignment judge and 55 no bills were found. The 16th Grand Jury heard similar cases for a period of seven full days. Out of the 267 cases presented to this grand jury, 225 true bills were returned to the assignment judge and 42 no bills were found. In every case where an indictment was returned, one or more witnesses appeared and testified before the grand jury. Furthermore, there was sufficient evidence presented to this court to indicate that the grand juries deliberated and voted accordingly on each and every case presented to them. Although cases were presented to those grand juries by the prosecutor's office with dispatch, there was no evidence in the record to indicate any unlawful practice or procedure. This court therefore concludes that the 15th and 16th grand juries spent sufficient time deliberating and voting on each case presented to them.

[15] After these indictments were returned, many were dismissed by the court on the prosecutor's motion after an amended or new complaint was filed charging the accused with a lesser offense under the Disorderly Persons Act. This procedure is commonly referred to as "downgrading" an indictment. It is employed by the prosecutor only after he has considered the circumstances of the offense charged, the

status of the defendant, and whether the best interests of justice will be served by charging the accused with the lesser offense. If the facts warrant, the charge is downgraded. In the past this procedure has proved an effective device for disposing of criminal cases as well as protecting the accused and society. However, it is defendants' contention that the use of this procedure in the instant case was an *indicia* of misconduct on the part of the 15th and 16th grand juries. This court does not agree with this argument, for the sole question presented in downgrading an offense is whether, after considering the facts of the particular case, the best interests of justice will be served by charging the accused with a lesser offense. Downgrading an offense does not depend upon the weight of the evidence. Therefore, the mere fact that several cases were "downgraded" does not permit this court to infer that in those cases there was insufficient evidence before a grand jury to indict the accused.

[16–18] Under the present state of the law, grand jury proceedings are generally considered secret. *State v. DiModica*, 40 *N. J.* 101 (1963). The reasons for grand jury secrecy were aptly stated in the case of *United States v. Rose*, 215 *F. 2d* 617, 628–629 (3 *Cir.* 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."
>
> (Quoted in *State v. DiModica*, *supra*, 40 *N. J.* at *pp.* 409–410, and *State v. Clement*, 40 *N. J.* 139–143 (1963))

This veil of secrecy may be lifted when the Court is satisfied under the circumstances of a particular case that the policy

of secrecy should be subordinate to the search for the whole truth. *State v. Farmer*, 48 *N. J.* 145, 152 (1966).

Since defendants charged the grand juries with serious misconduct, the Court permitted defendants to inquire as to whether there was some legal evidence before each grand jury to support a return of the indictments in question and whether each grand jury spent sufficient time deliberating on each case. This is permissible under the law. See *State v. Donovan*, 129 *N. J. L.* 478, 483 (*Sup. Ct.* 1943). However, this court refused to allow defendants to inquire as to the competency and adequacy of evidence before the grand jury. This is not required by the Fifth Amendment to the United States Constitution. *Costello v. United States*, 350 *U. S.* 359, 363, 76 *S. Ct.* 406, 100 *L. Ed.* 397 (1956). Furthermore, to hold otherwise would create undue delay in the trial of criminal cases because the court would have to conduct a preliminary hearing in each case to determine the competency and adequacy of the evidence before the grand jury. As indicated heretofore, there was legal evidence presented to the grand jury in each case where an indictment was returned to the court. Therefore, this court concludes that there was no misconduct on the part of the 15th and 16th grand juries.

[19] Defendants' final contention on this point is that the court was in error for failing to inquire of each grand juror regarding the possibility of prejudice against defendants or members of their class. This argument presents the question whether the court has the duty and responsibility to make such an extensive inquiry of prospective grand jurors. There is no case law or statute which imposes this duty upon the court. At present it is sufficient that the court instructs grand jurors to decide each case on the merits and "without fear or favor, prejudice or sympathy, examine the evidence presented * * * in each case and determine whether or not it merits your returning an indictment against the accused." In addition, grand jurors are required to take an oath

pursuant to *N. J. S.* 2A:73–3, which provides in pertinent part:

"* * * that you shall diligently inquire * * * that you shall present no one through envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, for reward, gain or the hope thereof * * *"

In view of the above procedures this court concludes that the charge, coupled with the required oath, is sufficient to preclude the possibility of prejudice on the part of the grand jury. The court therefore is under no obligation to question grand jurors regarding the possibility of their being prejudiced against a prospective defendant or class of defendants.

THE COMPOSITION OF THE GRAND AND PETIT JURIES

The defendants' final contention is that the grand and petit juries were improperly and unconstitutionally impaneled. In particular, defendants claim that the procedure employed by the Essex County jury commissioners in the selection of grand and petit jurors resulted in a systematic and deliberate exclusion of Negroes, women, residents of the City of Newark, and persons of lower economic status. Defendants submit that this alleged discrimination deprived them of their rights to an indictment constitutionally found and to trial by jury in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States and *N. J. Const.* (1947), *Art.* I, *par.* 8. Due to the gravity of this claim the court conducted an extensive hearing commencing October 9, 1967, to determine the veracity of the above claims. The hearing was concluded on March 22, 1968 upon the filing of supplemental briefs requested by the court.

[20] The New Jersey Legislature has entrusted the jury commissioners of each county with the task of obtaining

grand and petit jurors with a view to the "just distribution of jury service among those persons qualified therefor in the various wards and municipalities of the county." *N. J. S.* 2A:70–1. The jury commissioners are guided by *N. J. S.* 2A:69–1, which provides the qualifications for jury service, and *N. J. S.* 2A:69–2, which sets forth exemptions from jury service. Jury commissioners are given discretion in the selection of jurors and the courts will not substitute their own formula for that chosen by the jury commissioners in the absence of proof of "bad motive." *State v. Biehl*, 135 *N. J. L.* 268, 270 (*Sup. Ct.* 1947); *State v. Grundy*, 136 *N. J. L.* 96 (*Sup. Ct.* 1947); *State v. Stewart*, 2 *N. J. Super.* 15, 21 (*App. Div.* 1949).

[21, 22] It is a well established principle of our jurisprudence that juries, as instruments of public justice, be truly representative of the community. *Smith v. State of Texas*, 311 *U. S.* 128, 130, 61 *S. Ct.* 164, 85 *L. Ed.* 84 (1940); *Glasser v. United States*, 315 *U. S.* 60, 85, 62 *S. Ct.* 457, 86 *L. Ed.* 680 (1941); *State v. Stewart*, *supra*, 2 *N. J. Super.*, at *p.* 26. Therefore, a deliberate and systematic exclusion from jury service of Negroes or any other qualified class of persons constitutes a deprivation of equal protection under the Fourteenth Amendment to the Constitution of the United States. *Strauder v. State of West Virginia*, 100 *U. S.* 303, 25 *L. Ed.* 664 (1880); *Neal v. State of Delaware*, 103 *U. S.* 370, 26 *L. Ed.* 567 (1880); *Rogers v. State of Alabama*, 192 *U. S.* 226, 24 *S. Ct.* 257, 48 *L. Ed.* 417 (1903); *Patton v. State of Mississippi*, 332 *U. S.* 463, 68 *S. Ct.* 184, 92 *L. Ed.* 76 (1947). However, this principle cannot be taken to mean that an accused is entitled to have one or more persons of his race or class on the jury panel, for it is equally well settled that the accused only has a right to a jury selected without discrimination or bias towards any particular race or class. No defendant has the right to have a jury composed in whole, in part, or in proportion to any specific racial, economic or geographical group. *Virginia v. Rives*, 100 *U. S.* 313, 25 *L. Ed.* 667 (1880).

[23, 24] All jury discrimination cases present a question of fact. In the case at bar this court must determine whether the jury commissioners, through their practices and procedure in selecting jurors, deliberately and systematically excluded Negroes, women, residents of the City of Newark and persons of lower economic status. There is a presumption in favor of the validity of the indictment and panel. The defendant who asserts that there has been discrimination in the selection of the jury panel has the burden of proving it. *Martin v. State of Texas*, 200 *U. S.* 316, 26 *S. Ct.* 338, 50 *L. Ed.* 497 (1905); *Akins v. State of Texas*, 325 *U. S.* 398, 65 *S. Ct.* 1276, 89 *L. Ed.* 1692 (1944). Once the movant establishes a *prima facie* case of discrimination, *i. e.*, a significant disparity between those *qualified* for jury service and those of the group actually on the jury lists, the burden of proof shifts to the prosecution to explain this disparity. *Whitus v. Georgia*, 385 *U. S.* 545, 550, 87 *S. Ct.* 643, 17 *L. Ed. 2d* 599 (1967). However, the indictments should not be dismissed except on the clearest and plainest grounds. *Cf. State v. Chandler*, 98 *N. J. Super.* 241, 245 (*Cty. Ct.* 1967).

This court must now examine the practices and procedures employed by the Essex County jury commissioners and their staff in obtaining grand and petit jurors. Since the procedure of selecting grand and petit jurors differ, they shall be dealt with separately.

Names of prospective grand jurors are obtained by the jury commissioners, who solicit such names from various civic organizations, churches, labor unions, phone books and various other organizations including the National Association for the Advancement of Colored People. This system is commonly referred to as the "key-man" system. Although this system is somewhat outmoded, this court has found no case declaring it to be unconstitutional *per se*. After these names are supplied to the jury commissioners they are turned over to their staff who, in turn, send an objective questionnaire to the prospective grand jurors. Form, see

R. R. 1:29–2. The questionnaire requests answers to certain questions regarding the prospective juror's background in order that it may be determined whether he is qualified pursuant to *N. J. S.* 2A:69–1, or exempt from jury service pursuant to *N. J. S.* 2A:69–2. After the staff, under the supervision of the jury commissioners, makes this determination, the names are placed on the master list. Generally the names supplied by the jury commissioners prove insufficient. In such instances members of the staff, at the direction of the jury commissioners, go to the superintendent of elections office and obtain additional names from the Voter registration list or take names not used in prior lists. Generally, names taken from the voter registration list in this instance are persons residing in Newark. There is no marking to indicate race, color, creed or ethnic background on either the questionnaire, master list, or voter registration list. The grand jury master list usually contains approximately 300 names. The final selection of who will serve on the grand jury is done by drawing 50 of the 300 names from a roll box in open court in the presence of a judge.

Names of prospective petit jurors are taken solely from the voter registration lists of Essex County. The voters' names are on addressograph plates in the office of the superintendent of elections for Essex County. Each plate contains the name, address, district and ward of each registered voter, and the plates are arranged on trays by ward and district, street number first and then alphabetically by name. The voter registration printed lists are made up from the addressograph plates and are arranged in the same manner as the plates. Since 1956 the staff, at the direction of the jury commissioners, has prepared petit jury lists by selecting names in a given alphabet range from the addressograph plates. For example, in 1967-1968 the jury commissioners' staff authorized the use of the letters M to R in preparing the petit jury panels. The staff went through the plates and sought the names beginning with those letters. They then placed each name on a standard questionnaire and a blank card. If a

large family of registered voters appeared on the plates, only two names would be chosen without regard to sex. The questionnaire was then mailed to the prospective juror after the staff checked the name against the city directory to determine if the prospective juror had an excludable occupation. If so, the questionnaire was not mailed. The blank cards were retained by the staff as a record indicating to whom questionnaires were sent. Prior to 1966 the printed voter registration list rather than the addressograph plates were employed for this purpose.

Approximately 35,000 questionnaires are mailed out to prospective petit jurors in the various wards and municipalities of the county at the beginning of each year.[1] The number of questionnaires mailed annually varies in accordance with the needs of the court for petit jurors. Out of this total number, approximately 5,000 questionnaires are returned "Address Unknown", and an additional 15% of the total number mailed receive no response. The majority of these questionnaires returned "Address Unknown", or those which receive no response are addressed to Newark residents. Questionnaires which are returned are reviewed by the staff with the approval of the jury commissioners. Those persons who do not qualify or are exempt from jury service are not placed on the list. The names of those persons who do qualify are placed on IBM cards and then into a computer

[1] Questionnaires are mailed a year in advance to preparing the petit jury master lists for a particular term of court. Following is a schedule of the 1965 and 1966 total mailings, which names were used to compose the 1966 and 1967 petit jury master lists:

	1965 for 1966			1966 for 1967		
Municipality	*Male*	*Female*	*Total*	*Male*	*Female*	*Total*
Belleville	685	193	878	1141	283	1424
Bloomfield	881	396	1277	1536	644	2180
Caldwell	226	110	336	268	125	393
Cedar Grove	399	68	467	457	114	571
East Orange	1530	522	2052	2249	852	3101
Essex Fells	102	77	179	135	89	224
Fairfield	134	20	154	201	29	230
Glen Ridge	227	140	367	352	184	536

which sorts and shuffles the cards at the request of and in the presence of the court and jury commissioners and produces the names of persons selected as jurors.

[25, 26] The procedure heretofore discussed is unlike any procedure condemned as unconstitutional by our federal courts. For example, in *Whitus v. Georgia, supra,* prospective jurors' names were chosen from a tax digest on which a "C" was placed after every Negro name. In addition, there was a significant disparity between the percentage of Negroes on the tax digest (27.1%) and that on the grand jury venire (9.1%) and the petit jury venire (7.8%) which strongly pointed to a conclusion of discrimination. Likewise, in *Avery v. Georgia,* 345 *U. S.* 559, 73 *S. Ct.* 891, 97 *L. Ed.* 1244 (1953), not only was the source of prospective jurors' names maintained on a racially segregated basis, but also the names of prospective Negro jurors were placed in the jury box on yellow colored tickets. In both the aforesaid cases, it was primarily the procedure employed in selecting jurors that pointed to the conclusion of discrimination. See also *Arnold v. North Carolina,* 376 *U. S.* 773, 84 *S. Ct.* 1032, 12 *L. Ed.* 2d 77 (1964); *Norris v. State of Alabama,* 294 *U. S.* 587, 55 *S. Ct.* 579, 79 *L. Ed.* 1074 (1935).

There are several other cases in which a long and continued absence of Negroes on the jury lists brought the court to a conclusion of discrimination. See, for example,

Irvington	1427	422	1849	2132	421	2553
Livingston	927	132	1059	850	399	1249
Maplewood	888	354	1242	989	396	1385
Millburn	657	254	911	864	264	1128
Montclair	717	400	1117	927	442	1369
Newark	5163	1625	6788	8728	2887	11615
North Caldwell	156	47	203	194	44	238
Nutley	755	254	1009	935	354	1289
Orange	575	190	765	1236	474	1710
Roseland	113	68	181	171	50	221
South Orange	507	301	808	610	338	948
Verona	528	169	697	614	159	773
West Caldwell	308	114	422	421	133	554
West Orange	906	379	1285	1406	603	2009

Pierre v. State of Louisiana, 306 *U. S.* 354, 59 *S. Ct.* 536, 83 *L.Ed.* 757 (1939); *Patton v. State of Mississippi, supra.* The case at bar differs from both of these situations. There was no direct evidence presented to the Court which indicated that the jury commissioners or their staff deliberately and systematically excluded Negroes from the jury panels. Likewise there was no marking as to race, color or ethnic background on the source from which names were obtained, *i. e.*, the voter registration lists, addressograph plates of registered voters, printed list of registered voters or master list. The only questionable practice is the "key-man" system, which involved the partial selection of grand jurors from community sources by the jury commissioners. However, even in this instance there was no indication of discrimination for the names were solicited by the jury commissioners from varied sources, including Negro and labor organizations. Likewise, the names so supplied to the commissioners were not earmarked by race or otherwise. In addition, there has been no continued absence of Negroes on our grand and petit juries. On the contrary, there was ample testimony in the case at bar that there has always been Negro representation on the grand jury panels. In fact, there were three Negroes on the 15th grand jury and one Negro on the 16th. This court therefore concludes that the practices and procedures employed by the jury commissioners in the selection of grand and petit jurors is not violative of the Federal Constitution nor does such procedure point to a conclusion of discrimination towards any race or class of individuals.

Since there is nothing unconstitutional about the jury selection procedure *per se*, the next question presented is whether there is such significant under-representation on the jury lists of Negroes, women, residents of the City of Newark and persons of lower economic status as would strongly point to a conclusion of discrimination. If so, there is the further question whether such under-representation establishes a *prima facie* case of discrimination, thereby rebutting the presumption of validity of the jury panels and shifting the

burden of proof to the prosecution to explain the disparity. See *Whitus v. Georgia, supra,* 385 *U. S.,* at *p.* 550, 87 *S. Ct.* 643.

During the hearing heretofore mentioned, the composition of the grand and petit juries was determined by the use of statistics and what is commonly called a "random sample technique." For the purpose of determining the composition of the grand jury, this court considered the four past grand jury master lists, *i. e.*, from May 1966 to May 1967. The lists totalled 1,200 names and defendants used a sample of 300 names to determine race, sex, residence and occupational background of the jury panels. The sample indicated that of the names on the grand jury master list, 25.0% were female (24.8% by actual count), 26.7% were residents of Newark (26.9% by actual count), and 6% were Negro (by sample only). The average occupational breakdown on the aforesaid grand jury lists was approximately 39% professional, 16% manager, 9% clerical, 9% sales, 2% craftman, 2% operative, 2% household, 1.5% laborer, .5% unemployed, 1.5% housewife, 14% retired, and .5% self-employed. The largest classification was "professional" and included over 100 professions or occupations.

According to the population statistics furnished by defendants, the breakdown of the Essex County population between the age of 21 and 74 years indicates that 52.2% are female, 41.7% of the county population reside in Newark, and 17% of the county population are Negro.

[2] The occupational breakdown of the Essex County labor force is as follows: professional 11.55%, manager 8.20%, clerical 16.47%, sales 7.41%, craftman 11.56%, operative 20.19%, household 9.93%, laborer 4.03%, unemployed 2.51%, housewife (not considered in labor force), retired (not considered in labor force), and self-employed 8.15%. There were no statistics introduced in evidence to indicate the number of persons qualified for jury service in any of the aforesaid classifications. For example, there was no evidence to indicate the number of persons classified in "craftman" who

were eligible or qualified for jury service. There was no evidence presented to indicate to this court the percentage of those persons in each class who were not qualified for jury service or were exempt from it. In addition, there were no statistics presented to the court to indicate the percentage of persons in each class who were or were not registered to vote in the County of Essex. There is a probable inference that the composition of the grand jury panels was a result of the legitimate application of statutory standards of qualifications and exemptions. Thus, if this court were to find discrimination in the case at bar based solely on the aforesaid statistics, that conclusion would be founded on mere conjecture and speculation. Furthermore, to expect the jury commissioners to provide a perfectly balanced jury list would be to impose an Herculean task upon them. This court therefore concludes that there is insufficient evidence to support a *prima facie* case of discrimination in the selection of the grand jury panels.

[28] Additional evidence was introduced to indicate the probability of observing the present composition of the grand jury. For example, defendants' statistician testified that assuming Negroes between the ages of 21 and 74 years comprise 17% of the Essex County population, the probability of observing 6% or less Negroes on a given grand jury list is less than one in a million. The same statistician also testified that he would expect to find on a grand jury master list of 300 names, 12.7% to 21.3% Negroes 95% of the time. The court is not impressed with these statistics because defendants' statistician admittedly did not consider all of the qualifications for jury service or exemptions from jury service. Namely, defendants' statistician did not consider the percentage of Negroes, women, residents of Newark and persons of lower economic status between the ages of 21 and 74 years who were disqualified from jury service because they were: (1) not a resident of this State for at least two years; or (2) not a resident of Essex County; or (3) convicted of a crime, or (4) not able to read, write and understand the

English language; or (5) they had a mental or physical disability which would prevent them from properly serving as jurors. *N. J. S.* 2A:69–1. Likewise, defendants' statistician did not consider the percentage of persons in each of the aforesaid groups who would be exempt from jury service by virtue of the fact that they were: (1) a member or employee of a police force or fire department, or (2) a member of the state or federal military forces, or (3) employed as a school teacher, or (4) entrusted with the care and custody of a minor child and jury service would interfere with the care required of such child. *N. J. S.* 2A:69–2. These factors would significantly decrease the number of qualified persons in each of the aforesaid groups. Therefore, since the validity of these statistics is so tenuous, this court finds them inconsequential on this motion. The application of mathematical techniques in the proof of facts of a criminal case should be approached with caution and restraint. See *People v. Collins*, 66 *Cal. Rptr.* 497, 438 *P.* 2*d* 33 (*Cal. Sup. Ct.* 1968); but see "The Application of Statistical Decision Theory to the Jury Discrimination Cases," *Harv. L. Rev.* 338.

This court now turns to the composition of the petit jury. It has considered the four petit jury master lists for May 1966 to May 1967 consisting of approximately 18,000 names. Since the voter registration lists are the source for the petit jury lists, it is incumbent upon this court to know the composition of those lists. If a particular group of persons fails to register to vote, it is not the result of discrimination that the particular group is not represented on the jury panels. The evidence indicates that in 1967 53.9% of the voters registered in Essex County were women and 33.3% of all voters residents of Newark. There was no evidence introduced to indicate the number of Negroes registered to vote in this county or the number of registered voters in each of the occupational classifications heretofore discussed in the selection of the grand jury.

[29] A review of the record indicates that out of all the questionnaires mailed for the 1966 lists, 26.3% were sent

to women, and for the 1967 lists, 26.1% were sent to women. The resulting average of women on the four petit jury lists was 22.7%. The apparent cause of this disparity is two-fold. First of all, *N. J. S.* 2A:69–2(*g*) provides that

> "Any person who has the actual, physical care and custody of a minor child and who gives written notice to the jury commissioners of the county of his residence that jury service would interfere with the care required for such child shall be exempt * * *."

Naturally, many more women than men fall into this category of exemption, thereby explaining the imbalance. Furthermore, where a family's name appears on the voter registration lists, the jury commissioners' staff would only choose one or two members of that family to serve on jury duty. In many instances the male name was chosen to alleviate the burden of service on women entrusted with the care of minor children. Although a disparity resulted by use of the aforesaid procedure, this court cannot dismiss the indictments on this ground in the absence of showing that the jury commissioners were arbitrary or deliberate in their exclusion of women from the jury lists, or that their action was probably harmful to defendants' substantive rights. *Butler v. State*, 229 *N. E.* 2*d* 471 (*Ind. Sup. Ct.* 1967).

[30] *N. J. S.* 2A:70–1 provides in pertinent part that the jury commissioners are to prepare grand and petit jury lists with a due regard to "the just distribution of jury service among those persons qualified therefor in the various wards and municipalities of such county." In compliance therewith the jury commissioners sent questionnaires for jury service to residents of every municipality in the county.[2] Of the total questionnaires sent to prepare the 1966 petit jury lists, 28.2% were sent to Newark residents. Of the total questionnaries sent to prepare the 1967 petit jury lists, 31.2% were sent to

[2] See footnote 1, *supra*.

Newark residents.[3] The approximate percentage of Essex County Voters residing in Newark in 1966 was 34.5% and in 1967 was 33.3%. This leaves a 2.1% disparity in the 1967 mailing and a 6.5% disparity in the 1966 mailing. It must be noted that the voter registration list also includes persons not qualified for jury service because they are over 74 years of age and persons exempt from jury service because of their occupation. The court therefore finds this disparity insufficient to infer discrimination.

[31] Additional evidence was introduced which indicates that the petit jury master lists contained an average of approximately 20.3% residents of Newark after mailing. Defendants contend this under-representation is the result of using the voter registration lists as a source of names since the percentage of Newark residents registered to vote is less than the percentage of Newark residents in the general population. The court finds this argument without merit. Those who fail to register to vote in this county eliminates themselves from jury service. See: *Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 19th Cong., 1st Sess. 43 (1967). Recently the Federal Government passed into law the Jury Selection and Service Act of 1968, 28 *U. S. C. A.* § 1861 *et seq.* This federal statute approves the use of the voter registration lists as the source of names for jury service and indicates it is the most effective means of obtaining juries which reflect a fair cross-section of the community. This court agrees with the policy expressed in the federal statute and holds that the use of the voter registration lists as a source of names for jury service is a valid

[3] The total number of registered voters in Essex County for 1967 was 402,336. Newark had 133,964 registered voters, whereas the total number of registered voters in the suburbs was 268,372. Thus, suburban registered voters outnumber Newark voters by approximately a 2 to 1 ratio. (It is also interesting to note that the Central Ward of Newark had the least amount of registered voters when compared to the other wards in the city).

method of preparing jury lists, even though qualified members of a particular class of persons are under-represented on the voter registration lists.

[32] This court now turns to the question of the alleged disparity between the number of Negroes qualified for jury service and those actually on the petit jury master lists. A sample from the petit jury master lists of May 1966 to May 1967 was taken by selecting every 16th name and then personally interviewing the juror to determine his or her race. The sample totalled 299 names out of a universe on the four lists of approximately 18,000 names. The result of this sample showed 8.36% to be Negro. There was no evidence introduced to the court which indicates the number of qualified Negroes registered to vote in Essex County. Therefore, this court is without sufficient evidence to determine if a significant disparity exists between the number of Negroes qualified for jury service and the number of Negroes who actually served on the petit jury. As indicated heretofore, Negroes comprise 17% of the general population of Essex County between the ages of 21 to 74 years. When comparing this figure of 17% with the result of the sample (8.36%), one finds a disparity of 8.64%. This court cannot conclude that this disparity is the result of a systematic and deliberate exclusion of Negroes. There is the strong probability that this segment of the Negro population is not qualified for jury service, or is exempt from jury service, or has simply failed to register to vote. This court therefore concludes that defendants have failed to establish a *prima facie* case of jury discrimination against Negroes in the case at bar.

The aforesaid reasoning applies equally to the question of whether there is a significant disparity between the percentage of persons of lower economic status qualified for jury service and persons of that group who actually serve on jury duty. Again, defendants failed to introduce in evidence statistics which indicate the percentage of persons of lower economic status who are qualified for jury service or who are registered to vote in this county. Therefore this court con-

cludes that the defendants' statistics do not prove a policy or "formal method" of total and systematic exclusion of persons of lower economic status. See *Fay v. People of State of New York*, 332 *U. S.* 261, 67 *S. Ct.* 1613, 91 *L. Ed.* 2043 (1947). In addition, the case at bar differs materially from *Labat v. Bennett*, 365 *F. 2d* 698 (5 *Cir.* 1966), cited with emphasis by defendants. In *Labat* the Court found that there was a policy of "systematic total exclusion of daily wage earners as a class." (at *p.* 721). In the instant case there was significant representation of persons of lower economic status on the petit jury master lists. Therefore, this Court finds that defendants have failed to show a systematic or deliberate exclusion of persons of lower economic status from petit jury service.

In conclusion, defendants' motions to dismiss the indictments herein are denied.

APPENDIX C

Relevant Statutes

2A:69-1. Qualifications of Jurors

Every person, male and female, summoned as a grand juror, and every petit juror returned for the trial of any action of a civil or criminal nature in any of the courts of this State, shall be a citizen of this State for at least 2 years; over 21 and under 75 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime; and shall not, at the time of his selection, be a person who through his office, position or employment is either directly or indirectly connected with the administration of justice. Such person shall be able to read, write and understand the English language and shall not have any mental or physical disability which will prevent him from properly serving as a juror. As amended L. 1953, c. 9, p. 1026, § 1; L. 1964, c. 44, § 1.

2A:69-2. Exemptions from Jury Service

The following persons shall be exempt from service on any panel of grand or petit jurors:

a. Members or employees of police forces, State or local.

b. Members of any fire department or fire patrol, volunteer or paid.

c. Persons appointed as fish and game wardens or protectors.

d. Regularly licensed and practicing physicians and dentists in this State.

e. Members of State or Federal military, naval or air forces.

f. School teachers while their schools are in session.

g. Any person who has the actual physical care and custody of a minor child and who gives written notice to the jury commissioners of the county of his residence that jury service would interfere with the care required for such child.

h. All officers and persons regularly employed by any agency under the authority of the State Board of Control of the Department of Institutions and Agencies or regularly employed by hospitals.

i Telegraph and telephone operators and linemen and those directly engaged in the business of receiving and transmitting messages by telegraph or calls by telephone.

j. Any person who is the holder of an exempt firemen's certificate issued pursuant to sections 40:47-52 to 40:47-59 of the Revised Statutes or any other law.

k. Members of the State Legislature.

Amended by L. 1953, c. 140, p. 1346, §1, eff. May 7, 1953; L. 1968, c. 96, §1, eff. June 21, 1968.

2A:73-3. Oath of Foreman; Acting Foreman; Grand Jurors

To the foreman and acting foreman of the grand jury there shall be administered the following oath:

"You as foreman (acting foreman) of this grand inquest to sit in behalf of the State of New Jersey in and for the county of ..... do solemnly swear that you will support the Constitution of the United States and the Constitution of this State; that you do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make

any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of *such means*, and that you shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or in any way come to your knowledge touching the present service; that the counsel of the State and your own counsel you shall keep secret; that you shall present no one through envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, for reward, gain or the hope thereof; but that you shall present all things truly as they shall come to your knowledge, according to the best of your skill and understanding so help you God."

To the grand jurors as a body there shall be administered the same oath except that the first words "You as foreman" are to be replaced with the words "You as members." As amended L. 1953, c. 331, p. 1870, § 1; L. 1966, c. 146, § 1.

Effective June 18, 1966.

2A:69-1.1 Oath of Petit Jurors

Every person summoned for service as a petit juror who is not excused from serving upon the panel of petit jurors for which he is summoned shall, before he begins his service upon the panel, take the following oath:

"You do solemnly swear that you will support the Constitution of the United States and the Constitution of this State; that you do not believe in, advocate or advise the use of force, or violence, or other unlawful or

unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, *or* advises the use of *such means*, so help you God." L. 1953, c. 331, p. 1880, § 2, supplementing Title 2A, ch. 74, as amended L. 1966, c. 146, § 2.

2A:70-1. Grand and Petit Jury Lists; Number of Names on Lists

The jury commissioners of each county shall, at least 40 days prior to the commencement of each stated session of the Superior Court in their county, make 2 lists, alphabetically arranged and consecutively numbered, of persons liable to jury duty, having regard to the just distribution of jury service among those persons qualified therefor in the various wards and municipalities of such county. The lists shall state their occupation and places of abode, showing their respective municipalities and wards, if any, in municipalities, and shall be designated respectively the "grand jury list" and the "petit jury list." The number of persons named on the grand jury list shall at no time be less than 125 nor more than 300, to be determined by the assignment judge of the Superior Court for the county. The number of persons named on the petit jury list shall at no time be less than 250, the number to be determined by such assignment judge. A copy of each list shall be delivered forthwith to such assignment judge. The board of chosen freeholders of any county by resolution may provide for the purchase and use of the jury commissioners of the county electromechanical devices commonly designated automatic business machines with punch cards and card sorting machines. As amended L. 1957, c. 114, p. 486, § 1

APPENDIX D

Notice of Motion to Dismiss the Indictments

(Filed—September 29, 1967.)

PLEASE TAKE NOTICE that on the 6th day of October, 1967, or as soon thereafter as counsel can be heard, the defendant will apply, pursuant to R.R. 3:11-3, to the Essex County Court, at High Street, Newark, New Jersey, for an order to dismiss the indictments and alternatively to obtain, at county expense, copies of the grand jury venire lists, and to set down a reasonable hearing date on whether the grand jury in this case was constitutionally selected, and to adjourn the trial date until after a hearing and decision on all motions. This motion is based on the following grounds:

1. The Essex County Court's charge to the grand jury was so prejudicial to defendant and members of his class that the grand jurors could only have been biased against defendant.

Defendant was therefore denied the right to an indictment by an impartial grand jury, thereby denying him due process of the law under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section 8, of the New Jersey Constitution, and in violation of N.J.S.A. 2A:73-3 which sets forth the oath and duties of the grand jurors.

2. The court's failure to inquire of the grand jurors whether they were prejudiced against defendant and members of his class violated defendant's constitutional and statutory rights as set forth in paragraph 1 above.

3. The grand jury which indicted defendant met amidst widespread local and national publicity which was severely

prejudicial to defendant and members of his class. Said publicity and the July disturbances in Newark generated an extreme community hostility toward defendant and members of the Negro race. Said hostility was typified by the numerous prejudicial statements of Governor Richare Hughes. Consequently, defendant was indicted by a grand jury that was severely prejudiced toward him and members of the Negro race, thereby denying defendant his statutory and constitutional rights to an impartial grand jury indictment as set forth in paragraph 1 of this motion above.

4. The grand jurors which indicted defendant, pursuant to N.J.S.A. 2A:73-3, took an oath prior to their sitting, swearing to diligently and faithfully perform their duties and also,

> "that you do not believe in, advocate or advise the use of force, or violence or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in the State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons which so approves, advocates, or advises the use of such means."

(a) Said oath violates the First and Fourteenth Amendments to the United States Constitution, and oath comparable thereto have been condemned by the United States Supreme Court.

(b) Said oath denies defendant the right to be indicted by a grand jury which is constituted in accordance with the Fourteenth Amendment to the Constitution of the United States as defined by the United States Supreme Court.

(c) Said oath created an effect of instilling in the minds and consciences of the grand jurors who returned the indictments at issue here, a disregard of the Constitution of the United States.

(d) In addition, a portion of the unconstitutional language of the oath, i.e., "advocate, or advise the use of force, or violence or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State", combined with the declarations of public officials with regard to the disturbances, including the Governor, who stated the disorders were "a criminal insurrection" perpetrated by those who "hate America", and the Charging Judge, who stated that the matter involved was "a pattern of lawlessness", and further compounded by the totality of unconstitutional Grand Jury proceedings described herein, substantially prejudiced the defendant by the oath's inflammatory, vague, and unconstitutional language and its effect upon the Grand Jury.

5. The jurors who will hear defendant's case have, pursuant to N.J.S.A. 2A:69-1.1, taken an oath prior to their sitting, almost identical to the grand juror's oath set forth above.

(a) Said oath violates the First and Fourteenth Amendments to the United States Constitution, and oaths comparable thereto have been condemned by the United States Supreme Court.

(b) Said oath denies defendant the right to be tried by a jury which is constituted in accordance with the Fourteenth Amendment to the Constitution of the United States.

(c) Said oath has created an effect of instilling in the minds and consciences of the petit jurors who will hear defendant's case, a disregard of the Constitution of the United States.

(d) Further, a portion of the unconstitutional language of the petit juror's oath, i.e., "advocate, or advise the use of force, or violence or the unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State", combined with the declarations of public officials with regard to the disturbances, including the Governor, who stated the disorders were "a criminal insurrection" perpetrated by those who "hate America", and compounded by the totality of the unconstitutional petit jury proceedings described herein, substantially prejudiced the defendants by the oath's inflammatory, vague and unconstitutional language and its effect upon the prospective petit jurors and threatens to infringe defendant's right to a fair and impartial trial by jury.

6. Defendant was indicted on July 25, 1967, a day when the grand juries sitting in Essex County returned 207 indictments. This permitted approximately two minutes per indictment. The speed of the indictment is indicative of the rubber-stamp nature of the grand juries which indicted defendant and members of his race. It denied defendant the full and fair grand jury deliberation required by the Fifth and Fourteenth Amendments to the Constitution of the United States and required by the New Jersey Constitution, and in addition deprived defendant of his rights under N.J.S.A. 2A:73-3, which requires grand jurors to "diligently inquire" into all matters placed before the grand jury.

Appendix D

7. No notes, minutes or transcript of the grand jury proceedings were taken. Said failure frustrates defendant's right to cross examination at trial, where it is well settled that one may compare grand jury testimony with testimony at trial to determine whether there is variance between the two. Said failure therefore denies defendant the right to cross examination and to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and guaranteed by the New Jersey Constitution.

8. There was no evidence or testimony before the grand jury upon which it could indict defendant on the charges against him.

(a) According to the public statements of Essex County Prosecutor, Byrne, cases were scheduled to be presented to the grand jury at the rate of 100 per day. On July 25, 1967, defendant was indicted along with 207 others. This permitted approximately two minutes for the Grand Jurors to inquire into and deliberate upon the two offenses alleged to have been committed by the defendant. This did not allow time for the presentation of testimony sufficient to indict defendant.

(b) Said indictments were returned against the defendant because the grand jurors were guilty of misconduct in the performance of their duties. This misconduct occurred because the grand jurors violated their oath, pursuant to N.J.S.A. 2A:73-3, to "diligently inquire" into all matters given to it.

(c) The misconduct of the grand jurors further occurred because the grand jury was prejudiced and biased as a matter of law against defendant. Said prejudice and

bias occurred because of the severely prejudicial charge of the Court to the grand jury, and because of the massive prejudicial publicity directed against defendant and members of his race. Said publicity reached every grand juror and was spearheaded by prejudicial statements of the Governor of New Jersey prejudging the guilt of those arrested.

(d) Because of said publicity the grand jurors were guilty of further misconduct as a matter of law against defendant in that they violated their oath and presented the indictments against him through prejudice and/or malice in direct violation of the grand jury oath set forth in N.J.S.A. 2A:73-3.

(e) Said grand jurors were further guilty of misconduct in that they acted pursuant to and were prejudiced by an unconstitutional oath as set forth in paragraph 4 of this motion above.

9. The prosecution of defendant is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Despite the fact that the police officers who arrested defendant severely beat him without reason, neither has been arrested or charged with any crime. Selective police enforcement is state action prohibited by the Fourteenth Amendment to the United States Constitution and by the New Jersey Constitution.

10. The grand jury which indicted defendant was:

(a) Improperly and unconstitutionally impaneled because of systematic exclusion and deliberate discrimination against women was practiced in impaneling.

(b) Improperly constituted and impaneled because systematic and deliberate discrimination against residents of the City of Newark, and against certain sections of that City, to wit, the Central Ward was practiced in impaneling. The pattern and practice of discrimination in respect to the grand jury which indicted defendant has been the consistent pattern and practice in Essex County over a long period of time.

11. The above discriminations deprived defendant of his rights to an indictment constitutionally found in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States, and under Article 1, Section 8 of the New Jersey Constitution.

12. The facts suggest in addition that members of the Negro race and members of the lower economic classes were systematically and deliberately excluded from the grand jury venire lists.

In support of the motion we shall rely upon the affidavits and memorandum filed on even date.

Dated: September 29, 1967

OLIVER LOFTON AND HARRIS DAVID
By: /s/ HARRIS DAVID

To: ANDREW ZAZZALI, ESQ.
Assistant Prosecutor of
Essex County
Essex County Court House
Newark, New Jersey

(AFFIDAVITS OMITTED)

APPENDIX E

Order

(Filed—July 16, 1968.)

This matter having been presented to the Court on motion of defendant, John William Smith, *et al*, to dismiss indictments 2678-66, 2679-66 and others consolidated on this motion, Messrs. Harris David, Mark Gasarch and Oliver Lofton, Esquires, appearing on behalf of defendants, John William Smith, *et al;* and Andrew F. Zazzali, Jr., Esquire, Assistant Prosecutor, appearing on behalf of the State; and the Court having considered the testimony, evidence and arguments of counsel on behalf of defendants, *et al.*, in support of said motion and having additionally considered the briefs submitted; it is on this 16th day of July, 1968,

ORDERED that the motion of defendant John William Smith be and the same is hereby denied. And it is further

ORDERED that each of the motions consolidated with the motion of defendant, John William Smith, pursuant to a stipulation signed and filed with the Court on October 10, 1967, stating that such other motions involved common questions of law and fact with the Smith motion be and each is hereby denied.

Dated: July 16, 1968

/s/ JAMES R. GIULIANO,
A.J.C.C.

I hereby consent to the form of the within Order.

/s/ ANDREW F. ZAZZALI

APPENDIX F

Essex County Court Judgment Sheet

Indictment No.: 2678-66

Attorney: Oliver Lofton

Prosecutor: Paul T. Murphy

Court Reporter: Michael Pellichio

The defendant, being charged on August 17, 1967 on Indictment No. 2678-66 for the crime of A & Bon Pol. Off. id and defendant having pleaded not guilty and thereafter, having on March 25 through April 1, 1968 been tried with a Jury and a verdict-finding of Guilty having been rendered,

It is, therefore, on May 15, 1968 ordered and adjudged that the defendant be and is sentenced to: New Jersey State Prison for not less than 2 years nor more than 3 years.

JOSEPH G. LYONS
J.S.C.

Entered by

G. CAREY

APPENDIX G

Statistics

TABLE I

PERCENTAGE OF WOMEN ON GRAND JURY MASTER LISTS

JANUARY, 1960 THROUGH MAY, 1967 (by Actual Count)

Master List	*Males*	*Females*	*Total*	*Per Cent Females*
January, 1960	205	62	267	23.2
May, 1960	202	62	264	25.8
September, 1960	240	60	300	20.0
January, 1961	229	71	300	23.6
May, 1961	196	58	254	22.8
September, 1961	230	70	300	23.3
January, 1962	202	59	261	22.6
May, 1962	177	57	234	24.4
September, 1962	229	71	300	23.6
January, 1963	231	69	300	23.0
May, 1963	226	74	300	24.6
September, 1963	231	69	300	23.0
January, 1964	233	67	300	22.3
May, 1964	320	68	288	23.6
September, 1964	233	66	299	22.1
January, 1965	240	59	299	19.7
May, 1965	235	65	300	21.7
September, 1965	237	63	300	21.0
January, 1966	240	60	300	20.0
May, 1966	229	71	300	23.6
September, 1966	230	70	300	23.3
January, 1967	253	47	300	15.6
May, 1967	226	74	300	24.6

Average % = 22.4

(MT, 1094-1095)

Percentage of Age Qualified Community that are women = 53%

(MT, 1011)

Appendix G

Table II

Percentage of Newark Residents on Grand Jury Master Lists January, 1960 Through May, 1967 (by Actual Count).

Master List	*Non-Newark Residents*	*Newark Residents*	*Total*	*Percent of Newark Residents*
January, 1960	240	27	267	10.1
May, 1960	234	30	264	12.5
September, 1960	270	30	300	10.0
January, 1961	268	32	300	10.7
May, 1961	229	25	254	9.8
September, 1961	273	27	300	9.0
January, 1962	238	23	261	8.7
May, 1962	218	16	234	6.8
September, 1962	266	34	300	11.6
January, 1963	270	30	300	10.0
May, 1963	265	35	300	11.7
September, 1963	257	43	300	14.3
January, 1964	262	38	300	12.7
May, 1964	254	34	288	11.8
September, 1964	258	41	299	13.7
January, 1965	257	42	299	14.4
May, 1965	266	34	300	11.6
September, 1965	242	58	300	19.3
January, 1966	253	47	300	15.7
May, 1966	206	94	300	31.3
September, 1966	216	84	300	28.0
January, 1967	212	88	300	29.4
May, 1967	243	57	300	19.0

Average % = 14.5

(MT, 1033-1036)

Percentage of Age Qualified Community that are Newark Residents = 43.3% (1960) and in 1966 = 41.7%

(MT, 11 1011-1013)

Appendix G

Table III

Newark Ward Representation on Grand Jury Master Lists, May, 1966, Through May, 1967 (by Actual Count).

Ward	*May, 1966*	*Sept., 1966*	*Jan., 1967*	*May, 1967*
North	33	29	28	16
South	25	28	29	12
East	7	3	9	5
West	27	22	20	21
Central	2	3	2	3

(MT, 683-684)

Table IV

Newark Ward Representation on Grand Jury Master Lists, May 1966, Through May, 1967, (by Percentage).

Ward	*Total on Four Lists*	*Percent of Newark Residents in Each Ward on Four Lists*
North	106	32.6
South	94	29.0
East	24	7.4
West	90	27.7
Central	10	3.1

(MT, 1143-1144)

Appendix G

Table V

Percentage of Voters Residing in Newark Wards, 1965-1966, Compared With Percentage Breakdown of 1966-1967 Master Lists.

Ward	*Voters*	*Newark Residents on Master Lists*
North	22.7	32.6
South	23.2	29.0
East	16.0	7.4
West	21.9	27.7
Central	16.2	3.1

(MT. 1143-1144)

Table VI

Montclair Ward Representation on Grand Jury Master Lists, May, 1966, Through May, 1967 (by Actual Count)

Ward	*Residents on Master Lists*
First	33
Second	10
Third	21
Fourth*	2
Fifth	12

(MT. 685)

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* Ninety percent of the residents of the Fourth Ward are Negroes. (MT. 695).

Appendix G

Table VII

Occupational Analysis of Grand Jury Master Lists, May, 1966, Through May, 1967, With Comparisons

Occupational Classification	*May, 67*	*Jan., 67*	*May, 66*	*Sept., 66*	*Percent of County Labor Force In Each Occupation, 1960*	*Percent of Negro Labor Force In Each Occupation, 1960*
Professional	39.67	42.33	37.67	37.33	11.55	5.61
Manager	16.67	14.33	15.33	15.67	8.20	1.52
Clerical	11.00	6.00	9.00	8.33	16.47	8.91
Sales	7.67	8.00	10.33	11.67	7.41	2.30
Craftman	1.33	2.00	2.00	2.00	11.56	7.89
Operative	1.33	2.67	2.00	2.00	20.19	34.38
Household	.33	2.33	1.33	2.00	9.93	23.47
Laborer	.67	1.00	1.67	1.33	4.03	10.22
Unemployed	——	.33	1.33	.67	2.51	6.19
Housewife	10.00	6.33	10.00	11.00	——	
Retired	11.00	14.33	10.00	8.00	——	
Self-Employed	.33	.33	.33	——	8.15	

(Exhibits D-38, D-40)

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Table VIII

Representation, by Race and Sex, in General Occupational Categories, 1967

	White		*Negro*	
	Male	*Female*	*Male*	*Female*
White Collar Workers	43.4	62.5	17.9	24.9
Blue Collar Workers	46.1	28.5	70.00	40.9
Service Workers	10.5	9.0	12.1	34.2

(Exhibit S-1, p. 21; MT IV, 1408)

Table IX

Comparative Occupational Analysis of Grand and Petit Jury Master Lists, May, 1966, Through May, 1967

Occupational	*May, 1967*		*Jan., 1967*		*May, 1966*		*Sept., 1966*	
Classification	*Grand*	*Petit*	*Grand*	*Petit*	*Grand*	*Petit*	*Grand*	*Petit*
Professional	39.67	22.2	42.33	23.8	36.67	37.82	37.33	29.60
Manager	16.67	10.8	14.33	12.8	15.33	8.33	15.67	9.87
Clerical	11.00	9.7	6.00	13.8	9.00	14.74	8.33	12.11
Sales	7.67	10.8	8.00	5.7	10.33	10.90	11.67	5.38
Craft	1.33	10.4	2.00	13.5	2.00	8.97	2.00	11.66
Operative	1.33	12.5	2.67	12.4	2.00	5.13	2.00	9.42
Household	.33	5.6	2.33	2.1	1.33	3.21	2.00	1.79
Laborer	.67	6.6	1.00	7.1	1.67	1.92	1.33	5.38
Unemployed	——	1.0	.33	——	1.33	1.28	.67	.45
Housewife	10.00	5.6	6.33	5.3	10.00	3.85	11.00	7.62
Retired	11.00	3.8	14.33	2.8	10.00	3.21	8.00	6.73
Self-Employed	.33	1.0	.33	.7	.33	.64	——	——

(Exhibit D-38)

Appendix G

Table X

Analysis, by Sex and Municipality, of 1965-1966 Mailings of Juror Questionnaires to Prospective Petit Jurors (by Actual Count)

	Questionnaires Mailed			
	1965		*1966*	
Municipality	*Male*	*Female*	*Male*	*Female*
Newark	5163	635	8728	2887
East Orange	1530	522	2249	852
Irvington	1427	422	3172	859
Belleville	685	193	1141	283
Nutley	855	254	935	354
West Orange	906	379	1406	603
Montclair	717	400	927	442
Bloomfield	888	396	1516	644
South Orange	507	301	610	338
Glen Ridge	150	237		
Millburn	657	254	864	264
West Caldwell	308	114	421	133
North Caldwell	156	47	194	44
Caldwell Township	134	20	201	29
Caldwell	226	110	268	125
Essex Fells	102	77	135	89
Roseland	113	68	171	50

Appendix G

Questionnaires Mailed

Municipality	*1965* *Male*	*Female*	*1966* *Male*	*Female*
Maplewood	888	354	989	396
Livingston	927	132	850	399
Verona	528	169	614	159
Cedar Grove	399	68	457	114
Orange	575	190	1236	474
Totals	17,741	6,332	27,586	9,742

(MT, 528-575)

Percentage of Essex County Registered Voters Residing in Newark in 1964 and 1965 — 36.3%

(MT 111, 1058, MT IV, 1154—MT V, 1155)*

Percentage of Questionnaires Mailed to Newark Residents in 1966 Mailing Above — 31.2%

(MT IV, 1156)

Percentage of Questionnaires Mailed to Newark Residents in 1965 Mailing Above — 28.2%

(MT, II, 528-531; MT, IV, 1156)

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* The Trial Court found that the percentage of Essex County voters residing in Newark in *1967* was 33.3%, and that the percentage of questionnaires mailed to Newark residents "to prepare the 1967 petit jury lists" was 31.2%. The disparity of 2.1% (33.3-31.2) was insufficient to infer discrimination. 102 N. J. S. 354-355. The record is clear however that the 1965 and 1966 mailings were based on the 1964 and 1965 voter registration lists (36.3%) (MT, II, 576-577). The resultant disparities, 5.1% (36.3-31.2) and 8.1% (36.3-28.2), are statistically improbable (MT, IV, 1159).

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Table XI

Representation of Newark Residents on Petit Jury Panels Drawn from 1966-1967 Master Lists

	9-11 to 9-22-67		*9-25 to 10-6-67*		*10-9 to 10-20-67*		*10-23 to 11-3-67*	
Panel	*Newark*	*Non Newark*	*Newark*	*Non Newark*	*Newark*	*Non Newark*	*Newark*	*Non Newark*
A	11	59	4	66	10	60	12	58
B	15	55	19	51	13	57	14	56
C	19	51	12	58	15	55	10	60
D	13	57	9	61	12	58	10	60
E	6	64	13	59	17	53	8	62
F	6	64	14	56	8	62	11	59
G	14	56	19	51	14	56	11	59
H	7	63	12	58	13	57	10	60
I	14	56	13	59	12	58	13	57
J	11	59	10	60	11	69	15	55
	116	584	125	575	125	475	114	586
	(16.5)		(17.8)		(17.8)		(16.2)	

(MT, 658-659, 955-959, 961)

(MT, 1011-1012)

Percentage of Age Qualified Community that are Newark Residents = 43.3% (1960) and in 1966 = 41.7%

(MT, 1011-1013)

Appendix G

TABLE XII

MALE-FEMALE COMPOSITION OF PETIT JURY PANELS DRAWN FROM 1966-1967 MASTER LISTS

Panel	*9-11 to 9-22-67* Male	Female	*9-25 to 10-6-67* Male	Female	*10-9 to 10-20-67* Male	Female	*10-23 to 11-3-67* Male	Female
A	50	20	34	27	54	16	52	18
B	42	28	53	17	46	24	40	30
C	48	22	50	20	52	18	44	26
D	52	18	50	20	48	22	48	22
E	47	23	48	22	52	18	48	22
F	50	20	45	25	51	19	54	16
G	52	18	51	19	48	22	56	14
H	48	22	50	20	56	24	52	18
I	56	14	51	19	49	21	55	15
J	51	19	51	19	45	25	50	20
	496	204	492	208	401	199	499	201
		(27.1)		(29.7)		(28.4)		(28.7)

(MT, 955-959, 961, 658-659)

Percentage of Age Qualified Community that are Women = 53%

(MT 1011)

Appendix G

TABLE XIII

MEDIAN GRADES COMPLETED BY ESSEX COUNTY RESIDENTS OVER 25 BY RACE AND SEX

White	Male	11
White	Female	10
Negro	Male	10
Negro	Female	10
Other	Male	8
Other	Female	8

(Exhibit S-1, Table 11, page 9; MT IV, 1408)

TABLE XVI

PERCENTAGE OF WOMEN ON PETIT JURY MASTER LISTS, MAY, 1966, THROUGH MAY, 1967 (by Actual Count)

Petit Jury List	*Males*	*Females*	*Total*	*Percent Females on List*
May, 1966	2638	780	3418	22.8
Sept., 1966	3791	1128	4919	22.0
Jan., 1967	4800	1369	6169	22.1
May, 1967	2685	800	3485	23.3
Total	13,914	4,077	17,991	22.7

(MT, 611, 963, 1145, 1150)

Percentage of Age Qualified Community that are Women = 53%

(MT 1011).)

Appendix G

Table XVIII

Percentage of Newark Residents on the Petit Jury Master Lists, May, 1966, Through May, 1967. (by Actual Count)

Petit Jury Master List	*Newark*	*Non-Newark*	*Total*	*Percent Newark on List*
May, 1966	575	2843	3418	16.8
Sept., 1966	1162	3757	4919	23.6
Jan., 1967	1327	4842	6169	21.5
May, 1967	786	2699	3485	22.6
Total	3,850	14,141	17,991	21.4

(MT, 972-973, 1154).

Percentage of Age Qualified Community that are Newark Residents = 43.3% (1960) and in 1966 = 41.7%

(MT 111, 1011-1013)

Appendix G

Table VII

Percentage of Women on Grand Jury Master Lists, May 1966, Through May, 1967 (by Actual Count)

Grand Jury Master List	*Males*	*Females*	*Total*	*Percent Females*
May, 1966	229	71	300	23.6
Sept., 1966	230	70	300	23.3
Jan., 1967	253	47	300	15.6
May, 1967	226	74	300	24.6
Total	938	262	1200	21.8

(MT, 610, 1095, 1108)

Percentage of Age Qualified Community that are Women = 53%

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IN THE

United States Supreme Court

OCTOBER TERM, 1970

No. 269

JOHN WILLIAM SMITH,

Petitioner,

-vs-

STATE OF NEW JERSEY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF NEW JERSEY

JOSEPH P. LORDI
County Prosecutor of Essex County
Essex County Court House
50 W. Market Street
Newark, New Jersey

GEORGE N. PAPPAS
Assistant Prosecutor
On the Brief

LEGAL MIMEOGRAPHING SERVICE, INC.

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CASES CITED

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LEBAT v. BENNETT, 365 F. 2d 698 (5th Cir. 1966) 7
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NEW JERSEY STATUTES CITED

N.J.S. 2A:90–4 2

PRELIMINARY STATEMENT

The respondent, State of New Jersey, accepts the statements of Opinions Below, Jurisdiction, Questions Presented and Constitutional and Statutory Provisions Involved in the brief of the petitioner, except as supplemented or contradicted *infra*.

COUNTER-STATEMENT OF THE CASE

On September 29, 1967 the petitioner, John William Smith, moved to dismiss two indictments returned against him by the Grand Jury of Essex County, New Jersey, each of which indictments charged him with assault and battery upon a police officer contrary to the provisions of N.J.S. 2A:90-4. The basic ground for the defendant's motion was that the Grand and Petit Juries were improperly and unconstitutionally impaneled. More specifically, he claimed that the procedure employed by the Essex County Jury Commissioners in the selection of Grand and Petit Jurors resulted in a systematic and deliberate exclusion of Negroes, women, residents of the city of Newark and persons of lower economic status. Following extensive hearings and review of the applicable case law, the trial court concluded "that the practices and procedures employed by the jury commissioners in the selection of Grand and Petit Jurors is not violative of the Federal Constitution nor did such procedure point to a conclusion of discrimination towards any race or class of individuals". *State v. Smith*, 102 N.J. Super 325, 350 (Law Div. 1968).

The defendant was then tried on both indictments and convicted on one indictment on April 1, 1968. The jury was unable to reach a verdict on the other indictment. The defendant then appealed his judgment of conviction to the Appellate Division of the Superior Court of New Jersey. The New Jersey Supreme Court, however, certified such appeal before argument there. The New Jersey Supreme Court affirmed the defendant's conviction, indicating its agreement with the trial court's disposition of his argument in regard to the validity of the Grand and Petit Jurors by whom he was indicted and convicted. *State v. Smith*, 55 N.J. 476, 481 (1970). The New Jersey Supreme Court likewise considered and rejected the defendant's claim of prejudicial pre-trial publicity and the constitutionality of the statutory oath required of Grand and Petit Jurors. *Id.* at 481-82. The defendant now petitions this court for a Writ of Certiorari to the New Jersey Supreme Court to review the affirmance of his conviction. The respondent, State of New Jersey, submits that none of the reasons advanced by the defendant are sufficient to warrant this Court granting a Writ of Certiorari to the Supreme Court of New Jersey.

REASONS WHY WRIT SHOULD NOT BE GRANTED

POINT I

THE GRAND AND PETIT JURIES WHICH INDICTED AND CONVICTED THE DEFENDANT WERE PROPERLY AND CONSTITUTIONALLY IMPANELED.

It is the State's position that the trial court properly interpreted and applied the applicable judicial decisions of this Court to the facts before it and properly found that under-representation of the four groups cited by the defendant did not result from discrimination in violation of his constitutional right of due process. Analysis reveals that the cases relied upon by the trial court as well as other leading cases where discrimination in the selection of jurors was proven fall into three basic categories. First, those where the evidence established total or virtually total exclusion of an identifiable group within the community. Second, those where the evidence showed a substantial disparity between the total number of individuals within an identifiable group and their representation on jury panels (without regard to qualifications) when coupled with strong evidence pointing to the conclusion of discrimination. For example, evidence that there was either a long continued absence of Negroes on juries or utilization of a procedure allowing an opportunity to discriminate (such as a segregated tax digest from which jurors' names are drawn). Finally, those cases where the evidence showed such significant under-representation of a group, computed with regard to qualifications, as would necessarily point to discrimination. The petitioner's argument, however, is that a showing of mere disparity between the percentage of the total population of Essex County made up by an identifiable group at a given time and the percentage of the total number of Grand and Petit jurors made up by such identifiable group at such time makes out a *prima facie* case of discrimination, shifting the burden of proof to the State to come forward with sufficient evidence in rebuttal thereof. The petitioner's contention is without merit.

A. Proportional representation is not required.

The defendant in essence contends that the Essex County jury rolls do not represent a cross-section of the community and

that "the federal Constitution guarantees an accused 'due process and equal protection rights to an impartial jury representing a cross-section of the community'." (Pb10). He further alleges that "[t]he term cross-section 'means a very sample' of the community" (Pb10). These arguments are incomplete and misleading statements of the applicable legal precedents; when these statements are viewed in context, it is manifest that petitioner's contentions are without merit.

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates *an impartial jury drawn from a cross-section of the community . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, racial, religious, political, and geographical groups of the community; frequently such complete representation would be impossible.* But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Dow v. Carnegie-Illinois Steel Corp.* 224 F. 2d 414, 424 (3 Cir. 1955) (Emphasis Added).

This proposition has been reiterated in every case dealing with jury discrimination. A number of these cases are cited in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), where this Court spoke as follows:

> " '[But] *the defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn.*' (Citations Omitted) Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a

> race and no discrimination because of color, proportional limitation is not permissible. (Citations Omitted) We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community underrepresented as much as ten per cent. 380 U.S. at 208, 85 S. Ct. at 829. (Emphasis Added)

A review of the trial court's opinion reveals that the court was guided by the correct principles of law as outlined above and properly applied them to the facts before it. *State v. Smith*, 102 N.J. Super 325, 245 (1968). Thus, the fact that the Essex County jury rolls might fall short of representing a sample or cross-section of the community has no bearing on the propriety of the trial court's determination that defendant did not establish a *prima facie* case of discrimination.

B. The trial court applied the correct standard of proof in concluding that defendant had failed to present sufficient evidence to support a prima facie case of discrimination in the selection of grand or petit jury panels.

From his review of *Whitus v. Georgia*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967) and earlier cases the trial court concluded:

> "The defendant who asserts that there has been discrimination in the selection of the jury panel has the burden of proving it. (Citation Omitted). Once the movant establishes a *prima facie* case of discrimination, i.e., a significant disparity between those *qualified* for jury service and those of the group actually on the jury lists, the burden of proof shifts to the prosecution to explain this disparity." *State v. Smith, supra* at 346. (Emphasis Added)

Defendant alleges that the principles of law, as stated, are incorrect. Relying upon *Norris v. State of Alabama*, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), he argues that "[W]here the accused affirmatively shows a continuing pattern of substantial disparities between the size of identifiable groups within the community and their corresponding numbers on the jury lists, he has "made out a *prima facie* case of denial of equal protection." (Pb10,11) In other words, it is defendant's position that he need not show what percentage of the identifiable

group within the community were qualified as jurors, if any. Instead, he contends that the court must presume that all those within an identifiable group are qualified to serve as jurors. The State submits that the cases relied upon by defendant not only do not support him, but, in fact, reject his contentions.

In *Whitus v. Georgia, supra,* this Court held that the petitioner made out a *prima facie* case of discrimination by establishing a significant disparity between those *qualified* for jury service and those of the group actually on the jury list, thereby shifting the burden of proof to the prosecution to explain this disparity. In *Norris v. Alabama, supra,* the petitioner's proof was that Negroes constituted a substantial segment of the population, that some Negroes were qualified to serve as jurors and that *none had ever been called for jury service over an extended period of time.* In other words, petitioners evidence demonstrated a policy of total exclusion. In that context, the United States Supreme Court said that "the (State's) evidence failed to rebut the strong *prima facie* case which defendant had made. That showing as to the long-continued exclusion of Negroes from jury service, and as to the many Negroes qualified for that service could not be met by mere generalities" that no Negroes were qualified. *Norris* has absolutely no bearing on the case at bar. In Essex County, Negroes are not totally excluded from jury service. The same is true of *Patton v. State of Mississippi,* 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947) where petitioner urged that there were qualified Negroes in the county for jury service, and that no Negro had served on a criminal court grand or petit jury for a period of thirty years. In this context the Court in *Patton* and in other cases has held that it would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unable to serve. The defendant's reliance on the above cases is misplaced as they do not support the petitioner's contention that the trial judge applied an incorrect standard of proof.

C. The trial court correctly concluded that defendant's statistical evidence was so unreliable as to be insufficient to support a prima facie case of discrimination in the selection of the grand and petit juries.

The trial court found that the procedure utilized by the jury commissioners in selecting grand and petit jury panels were constitutional on their face. Moreover, he found that there was absolutely no evidence presented to the court indicating that the jury commissioners had deliberately and systematically excluded Negroes or any other qualified group from jury panels. *State v. Smith*, 102 N.J. Super. at 350. The defendant does not really challenge these rulings, but instead argues that the trial court erred in concluding that there was not such significant under-representation on the jury lists of Negroes, women, residents of the City of Newark, and persons of lower economic status as would establish a *prima facie* case of discrimination. He contends that the statistical evidence presented to the court was sufficient to establish a *prima facie* case of discrimination, thereby rebutting the presumption of the validity of the jury panels. Defendant relies on *Whitus v. State of Georgia*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); *Swain v. State of Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965); *Scott v. Walker*, 358 F. 2d 561 (5th Cir. 1966); *Cassell v. Texas*, 399 U.S. 282, 70 S. Ct. 629 (1950); *Lebat v. Bennett*, 365 F. 2d 698 (5th Cir. 1966); *Coleman v. Alabama*, 389 U.S. 22, 88 S. Ct. 2 (1967); and *Sims v. State of Georgia*, 389 U.S. 404, 88 S. Ct. 523 (1967); and *Jones v. State of Georgia*, 389 U.S. 24, 88 S. Ct. 4 (1967). A review of these cases manifests that they are inapplicable to the factual situation in the case at bar. Moreover, they demonstrate that defendant's statistical proofs were insufficient to establish a *prima facie* case of systematic exclusion, intentional or unintentional, of any identifiable group within the community because they were compiled without regard to qualificiations.

In *Coleman v. Alabama*, *supra*, no Negro served on the grand jury which indicted or the petit jury which convicted petitioner. Up to the time of his trial, *no Negro ever served* on the grand jury and few, if any, Negroes had served on the petit jury panels. The court held that this testimony in itself made out a *prima facie* case of denial of equal protection. The court's conclusion rested on the fact that the evidence was tantamount to a demonstration of total exclusion of Negroes as in *Norris v. State of Alabama*, *supra*. See also *Patton v. State of Mississippi* *supra*. In *Lebat v. Bennet*, *supra*, the Court found that there was

a policy of systematic total exclusion of daily wage earners as a class. At 721. In the instant case there has been no total or virtually total exclusion of any identifiable group. In *Whitus v. Georgia, supra* jury selections were made from segregated tax digests which this Court held allowed for the opportunity of discrimination. Moreover, *no Negro had ever served* on a jury in the county and although the percentage of Negroes qualified because of inclusion in the tax digest was in excess of twenty-seven per cent, only nine per cent had been called for grand jury service and less than eight per cent for petit jury service. This Court, therefore, concluded that the opportunity to discriminate by use of the segregated tax digests had been utilized. In *Jones v. Georgia, supra* the facts were almost identical to those in *Whitus* and the court therefore rested its decision on *Whitus*. Again in *Sims v. Georgia* the opportunity to discriminate was available through the use of segregated tax digests and it was readily apparent that this opportunity was utilized. In the instant case the trial court found that there were no markings as to race, color or ethnic background on the source from which names were obtained. In addition, there had been no continued absence of Negroes on grand and petit juries. Clearly, there is nothing about the procedure employed in selecting jurors in the instant case which points to the conclusion of discrimination as in the cases cited by defendant.

In *Scott v. Walker, supra* the Court found that the evidence pointed to a systematic limitation of Negroes. However, the evidence showed that no more than one per cent of the Negro population were on a panel, although some thirteen per cent of their population were *qualified*.

It should be noted that in *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397 (1953) petitioner offered no evidence to support a charge of limitation against the jury service of Negroes except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels. This Court held that it would not condemn good faith efforts to secure competent jurors merely because of varying racial proportions. 344 U.S. at 471-2, 73 S. Ct. at 415. In the instant case, defendant has shown no more than that certain groups within the community have lesser percentage participation on grand and petit juries than other groups, having regard for their

proportion of the population. Defendant has not established that the failure of the jury selection system to provide statistical perfection resulted from the systematic exclusion, intentional or unintentional, of any identifiable class or group of *qualified* persons in the community. The trial court was therefore correct in concluding that defendant had not sustained his burden of proof. *United States v. Bryant*, 291 F. Supp. 542 (Md. 1968).

POINT II

THE JURY COMMISSIONERS OF ESSEX COUNTY DID NOT DISCRIMINATE IN THE SELECTION OF GRAND JURORS AND PETIT JURORS EITHER BY AFFIRMATIVE ACTION OR A FAILURE TO ACT.

All those cases cited by the petitioner in support of his proposition that the Jury Commissioners failed in their affirmative constitutional duty to familiarize themselves with the composition of the Essex County Community and to insure constitutionally selected jurors involved situations where racial discrimination was patent. In *Cassell v. Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839 (1950) not more than one Negro served on each of 21 consecutive grand juries over a five and one half year period. In *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940) only three Negroes served on grand juries over an eight year period. In *Neal v. Delaware*, 103 U.S. 370, 26 L. Ed. 567 (1881) no colored citizen had ever been summoned as a juror in the courts of the State of Delaware. In addition, in both *Cassell v. Texas* and *Smith v. Texas* the jury commissioners involved testified that they were not personally acquainted with any Negroes and that they chose jury men only from those people with whom they were personally acquainted. *Cassell v. Texas, supra*, 339 U.S. at 278, 70 S. Ct. at 632, 94 L. Ed. at 847. The Essex County Jury Commissioners did not fail in any affirmative duty to familiarize themselves with the county community under the evidence presented below. Assuming *arguendo* that they did fail in such duty and under-representation of Negroes and other groups has resulted, there was no evidence below to support the premise that such result has been caused by discrimination of the kind encountered in *Cassell v. Texas, Smith v. Texas* and *Neal v. Delaware*. See *Cassell v. Texas, supra*, 339 U.S. at 288-89, 70 S. Ct. at 632-33, 94 L. Ed. at 848. Thus, the petitioner's contention when placed in context under the above cases is without merit.

POINT III

THE PETITIONER'S CONTENTION THAT THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER PHYSICAL POSSESSION OF MORE THAN FOUR GRAND AND PETIT JURY MASTER LISTS OPERATED TO RESTRICT HIS JURY STUDY IS TOTALLY WITHOUT MERIT.

The Grand and Petit Jury lists to which the petitioner refers under his Point III are a matter of public record, open to the examination of any citizen who desires to view them. Such lists are kept in the Essex County Clerk's Office. It is significant to note that in this regard the petitioner makes no citation whatsoever to the transcript of proceedings below. In the absence of evidence showing that the petitioner was actually deprived access to the jury lists in question, the defendant's contention that physical possession of such jury lists was necessary for his jury study without more explanation lacks merit.

POINT IV

THE DENIAL OF THE PETITIONER'S CLAIM THAT ADVERSE PUBLICITY DENIED PETITIONER AN IMPARTIAL GRAND JURY DOES NOT PRESENT A BASIS FOR CERTIORARI UNDER THE FACTS OF THIS CASE.

The defendant's contention in this regard was raised before the trial court and rejected. The respondent relies upon the trial court's opinion, finding no evidence in the record to support the petitioner's contention. *State v. Smith*, 102 N.J. Super at 338-39. (Pa 27, 28).

POINT V

THE TRIAL COURT'S DENIAL OF THE PETITIONER'S CLAIM THAT THE GRAND AND PETIT JURY LOYALTY OATHS DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS DOES NOT PRESENT A BASIS FOR CERTIORARI UNDER THE FACTS OF THIS CASE.

The petitioner's contention in this regard was again raised before the trial court and the New Jersey Supreme Court, both of which rejected it. The respondent relies upon the opinion of the New Jersey Supreme Court, 55 N.J. 476, 482 (Pa 7) as well as the opinion of the trial court, 102 N.J. Super at 332-337 (Pa 21, 26), finding that the petitioner lacks standing to challenge such oaths and, assuming he does possess standing, such oaths are constitutional.

CONCLUSION

For the foregoing reasons the respondent, State of New Jersey, submits that a petition for a Writ of Certiorari to the Supreme Court of New Jersey should not be granted.

Respectfully submitted;

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By
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